18-588

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 470. 23024

CLIFTON H. MOORE AND DAVID DAVIS, PLAINTIFFS IN ERROR,

vs.

RUFUS W. ROBBINS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED DECEMBER 4, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 470.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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1 UNITED STATES OF AMERICA, *ss:*

To RUFUS W. ROBBINS, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Illinois, wherein David Davis & Clifton H. More are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles B. Lawrence, chief justice of the supreme court of the State of Illinois, this third day of September, A. D. eighteen hundred and seventy one, and of the independence of the United States the ninety-sixth year.

CHARLES B. LAWRENCE,
Ch. Justice Sup. Court of Ill's.

2 UNITED STATES OF AMERICA.
State of Illinois, ss:

C. H. Moore, being duly sworn, says that he served this writ by reading the same to Williams & Bunn, attorneys & counselors for Rufus W. Robbins, defendant in error, on the 14 day of October, 1871; and that, on the 30 day of October, A. D. 1871, he served the same writ of citation, by delivering to Robert E. Williams & Hudson Burr, partners practicing law in the name of Williams & Burr, who are the counsellors of the defendant herein, Rufus W. Robbins, a true copy of the same, and informing them of its contents & effect, & requested them to deliver it to the defendant in error, their client.

CLIFTON H. MOORE.

Sworn to before me this 27 day of Nov., 1871.
[SEAL.] VESPASIAN WARNER,
Notary Public.

STATE OF ILLINOIS,
County of McGraw, ss:

This writ was duly read to Williams & Burr, as the attorneys of Rufus W. Robbins, on the 14 day of October, 1871, by me on this Oct. 14, 1871.

C. H. MOORE.

C. H. MOORE, being duly sworn, says that he——

(Indorsed:) Filed Oct. 16, '71. W. A. Turney, c'k.

3 Supreme court. In error. Central grand division.

DAVID DAVIS AND CLIFTON H. MORE, PLAINTIFFS IN ERROR,
vs.
RUFUS W. ROBBINS, DEFENDANT IN ERROR.

Know all men by these presents that we, Clifton H. Moore and David Davis, as principals, and John Warner, as surety, are held and firmly

bound unto the above-named Rufus W. Robbins in the sum of three hundred dollars, lawful money of the United States, to be paid to the said Rufus W. Robbins, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 28th day of August, A. D. 1871.

Whereas the above-named Davis & Moore have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the supreme court of the State of Illinois:

Now, therefore, the condition of this obligation is such, that if the above-named Davis & Moore shall prosecute said writ of error to
4 effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Signed) DAVID DAVIS. [ ]
CLIFTON H. MOORE. [L. S.]
JOHN WARNER. [ ]

Sealed and delivered in presence of—

Approved:

C. B. LAWRENCE,
Ch. Justice Sup. Court of Ills.

SEPT. 3RD, 1871.

5 UNITED STATES OF AMERICA:

United States of America to the justices of the supreme court of the State of Illinois, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said supreme court of the State of Illinois before you, between Rufus W. Robbins, appellant, and Thomas J. Bunn, David Davis, & Clifton H. Moore, respondents, a manifest error hath happened, to the great damage of the said David Davis & Clifton H. Moore, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause
6 further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this seventeenth day of August, in the year of our Lord eighteen hundred and seventy-one, and of the independence of the United States the ninety-sixth year.

[L. S.] W'M H. BRADLEY,
Clerk Circuit Court U. States,
Northern Dist. of Illinois.

7 (Upon the foregoing writ of error appears the following endorsements:)

"I have served this writ by delivering the same to Judge Lawrence, chief justice of the sup. court for the State of Illinois, & his reading the same & granting me a citation pursuant thereof, Sept. 26, A. D. 1871, and by leaving this same writ with the clerk of the supreme court of the State of Illinois for the central grand division, at Springfield, Illinois, with a copy thereof lodged with said clerk, W'm A. Turney, for the use of the opposite party, this 27 day of October, A. D. 1871.

"C. H. MOORE,
"*Pro se & Att'y for David Davis.*

"Filed Oct. 27th, 1871.

"W. A. TURNEY, *C. S. C.*"

"STATE OF ILLINOIS:

"Supreme court—central grand division.

"I, William A. Turney, clerk of said court, have executed this writ by delivering to C. H. Moore, one of the defendants in this court, in said cause, a true, full, and complete record of said cause, the same to be by him transmitted to the Supreme Court of the United States,
8 at Washington City, D. C., before the return-day named in this writ, Nov. 8, 1871.

"W'M A. TURNEY,
"*Clerk Supreme Court.*"

STATE OF ILLINOIS:

Supreme court—central grand division.

I, William A. Turney, clerk of said supreme court, hereby certify the foregoing to be a true copy of the bond filed in my office on the 16th day of October, A. D. 1871; and a true copy of the writ of error, and the endorsements thereon, filed in my office on the 27th day of October, A. D. 1871, in the case of Rufus W. Robbins vs. Thomas J. Bunn et al.

In testimony whereof I hereunto set my hand and affix the seal of said supreme court, at Springfield, this 8th day of November, 1871.

[SEAL.] W'M A. TURNEY,
Clerk Supreme Court.

9 Supreme court of United States, city of Washington, D. C. To the December term, 1871.

CLIFTON H. MOORE & DAVID DAVIS *vs.* RUFUS W. ROBBINS. } Writ of error from supreme court of Illinois.

And now come the plaintiffs in error and assign the following errors upon this record:

1st. The court below erred to the injury of the plaintiffs in deciding that the sale of the S. W ¼ of S. W. ¼ sec. 27, T. 19, R. 3 E., made by the United States land officers, at the land office at Danville, Illinois, at a public sale, on the 15 of November, 1855, to C. H. Moore, the highest bidder therefor, for cash, was null & void.

2. The court below erred in deciding that the sale of the S. E. ¼ of

S. W. sec. 27, T. 19, R. 3 E. 3d p. m., made by the United States land officers, at their land office in Danville, Illinois, at a public sale, on the 15th day of November, 1855, to John P. Mitchell, the highest bidder therefor, for cash, was null & void.

3. The court below erred in deciding that appellant Moore's title, by patent from *from* the United States, to the S. W. S. W. ¼ sec. 27, T. 19, R. 3 E. 3d p. m., was null & void.

10 4. The court below erred in deciding that Thomas J. Bunn, in obtaining his pre-emption to the S. ½ S. W. & S. ½ S. E. sec. 27, T. 19, R. 3 E. of 3d p. m., had honestly complied with the law of the United States in regard to pre-emptions, passed Sept. 4, 1841.

5. The court below erred in deciding that the mortgage made by Thomas J. Bunn to his father, Lewis Bunn, only two days after he had paid for his pre-empted land, & before he had obtained his patent therefor was not null & void.

6. The court below erred in not deciding that the appellee Robbins, complainant in the court below, obtained a void mortgage when he purchased the *the* mortgage given by Thomas J. Bunn to Lewis Bunn on the land pre-empted before a patent was issued therefor.

7. The court below erred in permitting Robbins to attack appellants', or either of their titles to the land in the bill named.

8. The court below erred in deciding that the appellants, or either of them, held their title in trust for appellee Robbins.

11 9. That the court below erred in not ordering an account to be taken of the amount of taxes legally paid by appellants on the land—the land in said bill described—& in not decreeing that Robbins pay the same to appellants.

For these and other errors which will be shown on the hearing of this cause, appellants ask that the decrees & orders herein made by the courts below may be reversed.

C. H. MOORE,
For Plaintiffs in Error.

12 At a supreme court begun and held for the central grand division of the State of Illinois, at Springfield, on the first Tuesday after the first Monday in January, A. D. 1870—present, Sidney Breese, chief justice; Charles B. Lawrence, justice; Pinckney, H. Walker, justice, to wit:

On the 17th day of January, A. D. 1870, being one of the days of said January term, A. D. 1870, of said supreme court, there was filed in the office of the clerk of said supreme court a transcript of a record, upon an appeal from the circuit court of De Witt County, wherein Rufus W. Robbins was appellant, and Thomas J. Bunn, Mary E. Bunn, Clifton H. Moore, and David Davis were appellees, which transcript is in the words and figures following:

STATE OF ILLINOIS,
De Witt County, ss:

Pleas had before the Hon. John M. Scott, judge of the eighth judicial circuit of the State of Illinois, and sole presiding judge of the
13 circuit court of De Witt County, at a regular term of said court, begun and held at the court-house in Clinton, in said county, on Monday, the day of May, in the year of our Lord one thousand eight hundred and sixty-six, that being the first Monday in said month—present, Hon. John M. Scott, judge; , State's attorney; , sheriff; , clerk.

Be it remembered that, on the 11th day of April, A. D. 1866, there was filed in the office of the clerk of said court, a certain bill to foreclose a mortgage, which is in the words and figures following, to wit:

Of the May term of the De Witt County circuit court, A. D. 1866.

STATE OF ILLINOIS, *De Witt County, ss:*

To the Honorable John M. Scott, judge of the eighth judicial circuit, in chancery sitting:

Humbly complaining, your orator, Rufus W. Robbins, of the county of Macon, and State of Illinois, would respectfully show unto your honor, that one Thomas J. Bunn, of the county of McLean, and State of Illinois, heretofore, to wit, on or about the twenty-second day of February, A. D. 1856, borrowed of one Lewis Bunn the sum of one thousand dollars, and executed to said Lewis Bunn therefor his promissory note for said sum, payable in three years after date, with six per cent. interest. A copy of which said note is herewith filed and asked to be taken as
14 a part of this bill. And for the purpose of securing the payment of said promissory note according to its tenor and effect, he, the said Thomas J. Bunn and Mary E. Bunn, his wife, then both of the county of De Witt, and State of Illinois, being the owners of certain lands hereinafter described, executed to said Lewis Bunn a certain deed of mortgage for said lands, which said deed of mortgage is substantially as follows, to wit:

"This indenture made this twenty-second day of February, in the year of our Lord eighteen hundred and fifty-six, between Thomas J. Bunn and Mary E. Bunn, his wife, of the county of De Witt, and State of Illinois, of the first part, and Lewis Bunn of the county of McLean, and State of Illinois, of the second part: Whereas the said parties of the first part *is* justly indebted to the said party of the second part in the sum of one thousand dollars ($1,000,) secured to be paid by a certain promissory note bearing even date herewith, calling for one thousand ($1,000) dollars due and payable in three years from date with six per cent interest, payable to Lewis Bunn or order, and signed by Thomas J. Bunn: Now, therefore, this indenture witnesseth that the said parties of the first part, for the better securing the payment of the money aforesaid, with interest thereon, according to the tenor and effect of the said promissory note above-mentioned, and also, in consideration of the further sum of one dollar to them in hand paid by the said party of the second part at the delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns forever, all the following-described real estate lying and being in the county of DeWitt, and State of Illi-
15 nois, to wit: The south half of the southeast quarter, and the south half of the southwest quarter of section number twenty-seven (27) in township number nineteen (19) north, of range three (3) east, containing one hundred and sixty acres: To have and to hold the same, together with all and singular the tenements, hereditaments, privileges, and appurtenances thereunto belonging, or in any wise appertaining, and also all the estate, interest and claim whatsoever in law as well as in equity which the parties of the first part have in and to the premises hereby conveyed unto the party of the second part, his heirs and assigns, and to their proper use, benefit, and behoof: Provided, always, and these presents are upon this express condition, that if the said

parties of the first part, their heirs, executors, or administrators shall well and truly pay or cause to be paid to the said party of the second part, his heirs, executors, administrators, or assigns the aforesaid sum of money, with such interest thereon, at the time and in the manner specified in the above-mentioned note, according to the true intent and meaning thereof, then and in that case these presents and everything herein expressed shall be absolutely null and void.

"In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day and year above written.

"THOMAS J. BUNN. [SEAL.]
"MARY E. BUNN. [SEAL.]

"STATE OF ILLINOIS, *McLean County*, ss:

"I, Andrew W. Rogers, a notary public in and for said county, do hereby certify that the above-named Thomas J. Bunn & Mary E. Bunn, (who are personally known to me to be the persons whose names are subscribed to the foregoing mortgage as having executed the same)
16 this day in proper person came before me and acknowledged that signed, sealed, and delivered the said mortgage for the uses and purposes therein mentioned. And the said Mary E. Bunn, wife of the said Thomas J. Bunn, having been made fully acquainted with the contents of said mortgage, and by me examined separate and apart from her , declared that she signed and acknowledged said mortgage and relinquished her dower in and to the lands thereby conveyed, freely, voluntarily, and without compulsion of her said husband.

"In testimony whereof, I have hereunto set my hand and official seal this twenty-second (22nd) day of February, 1856.

[SEAL.] "ANDREW ROGERS, *Notary Public.*"

Which said mortgage your orator would show was afterwards, to wit, on the 3d day of March, A. D. 1856, duly recorded in the proper clerk's office of the said county of DeWitt, in book of mortgages No. 1, page 189, by one Robert Lewis, the then clerk of the circuit court of said county and ex-officio recorder of deeds.

Your orator would further show that, afterwards, to wit, on the day and year aforesaid, the said Lewis Bunn, to whom, or to whose order the said sum of money in the said promissory note and mortgage specified was to be paid, before the payment of the same, assigned the said promissory note & mortgage to your orator. A copy of which said assignment is herewith filed and asked to be taken as a part of this bill, who is now the lawful owner and holder of the same.

Your orator would further show unto your honor that, although the said promissory note has long since been due and payable ac-
17 cording to its tenor and effect, that the said sum of money therein specified, to wit, the said sum of one thousand dollars still remains due and unpaid, and no part or parcel of the same or any of the interest accrued thereon has been paid, but the whole remains unpaid, whereby the said deed of mortgage has become forfeited to your orator and his right of foreclosure has accrued.

Your orator would further show unto your honor that he is informed that one Clifton H. Moore, of the said county of De Witt, has some pretended claim in or to some portion of said described lands, to wit, that he pretends to own the same by virtue of a pretended purchase of the same from the Government of the United States; but your orator would show unto your honor that the said lands, at the time of the execution of said note, and the execution and delivery of the said mort-

gage, was the property of the said Thomas J. Bunn, and that he had full right and authority to sell and convey the same by his deed of mortgage.

Your orator would show unto your honor that there is now due and unpaid upon said note and mortgage the sum of one thousand six hundred and seven dollars.

In consideration of the premises, your orator would pray that process of summons may issue herein, at the suit of your orator and against the said Thomas J. Bunn and Mary E. Bunn, and Clifton H. Moore, directed to the sheriff of McLean County, and returnable to the above term of said court; and also summons to the sheriff of De Witt County, returnable as above. That the said defendants be required to answer fully and particularly the allegations of this bill, as if thereunto specially interrogated, but not under oath, that being hereby expressly waived.

18 Your orator would further pray that an account may be had herein as to the amount due your orator upon the said note and mortgage, and that your honor, upon a hearing of this cause, shall order, adjudge, and decree that the said Thomas J. Bunn shall, within a day to be named, pay to your orator the said sum of money so found to be due him, and, in default of such payment, that your honor will order, adjudge, and decree a full foreclosure of said mortgage, and that the said lands therein described shall be, by the master in chancery for said county of De Witt, advertised and sold at public sale to satisfy the amount of said decree.

And your orator would pray for all such special and general relief as shall from the facts to be proved in this cause seem to be meet and just. And, as in duty bound, your orator will ever pray, &c.

RUFUS W. ROBBINS.
By A. B. BUNN, *Sol.*

Copy of note mentioned in said mortgage.

BLOOMINGTON, *Feb'y 22nd*, 1856.

Three years after date I promise to pay Lewis Bunn, or order, one thousand dollars, for value received, with six per cent. interest.

THO'S J. BUNN.

(Indorsed on the back of said note:)

I hereby assign all my right, title, & interest in the within note to R. W. Robbins.

LEWIS BUNN.

Copy of assignment on back of said mortgage.

I hereby assign all my right, title, & interest in the within
19 mortgage to R. W. Robbins.

LEWIS BUNN.

Whereupon there issued out of said court a summons, which is in the words and figures following, to wit:

STATE OF ILLINOIS, *De Witt County, ss:*

The people of the State of Illinois to the sheriff of said county, greeting:

We command you that you summon Thomas J. Bunn and Mary E.

Bunn, & Clifton H. Moore, if they shall be found in your county, personally to be and appear before the circuit court of said county on the first day of the next term thereof, to be holden at the court-house, in Clinton, in said De Witt County, on the first Monday of May next, to answer unto Rufus W. Robbins in his certain bill of complaint to foreclose a mortgage, filed in said court, on the chancery side thereof, and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Joseph J. Kelly, clerk of said court, and the seal thereof, at Clinton, this 12th day of April, A. D. 1866.

[SEAL.] JOSEPH J. KELLY, *Clerk.*

Which said summons was returned with the following endorsement, to wit:

20 STATE OF ILLINOIS, *De Witt County, ss:*

I have duly served this writ by reading and delivering a true copy of the same to Clifton H. Moore, on this 16th day of April, A. D. 1866.

Thomas J. Bunn and Mary E. Bunn not found in this county.

A. D. McHENRY, *Sheriff.*
By W. H. STOREY, *Deputy.*

(The writ issued to sheriff of McLean County on same day not among the files.—*Clerk.*)

And afterwards, to wit, on the 10th day of May, A. D. 1866, that being the fourth day of the regular May term of said court, and present as before-named, the following order was entered of record:

RUFUS W. ROBBINS } Bill to foreclose.
vs.
THOMAS J. BUNN. }

On motion of complainant, by his attorney, leave is granted the sheriff of McLean County to amend his return on the writ issued herein.

And afterwards, to wit, on the 8th day of September, A. D. 1866, there was issued out of the office of the clerk of said court a summons directed to the sheriff of McLean County; which said summons is in words and figures following, to wit:

21 STATE OF ILLINOIS, *De Witt County, ss:*

The people of the State of Illinois, to the sheriff of McLean County, greeting:

We command you that you summon Thomas J. Bunn and Mary E. Bunn, impleaded with Clifton H. Moore, if they shall be found in your county, personally to be and appear before the circuit court of said county on the first day of the next term thereof to be holden at the court-house in Clinton, in said DeWitt County, on the first Monday of November next, to answer unto Rufus W. Robbins in his certain bill of complaint to foreclose a mortgage filed in said court on the chancery side thereof, and have you then and there this writ with an endorsement thereon in what manner you shall have executed the same.

Witness Joseph J. Kelley, clerk of said court, and the seal thereof, at Clinton, this eighth day of September, A. D. 1866.

[SEAL.] JOSEPH J. KELLEY, *Clerk.*

Which said summons was returned with the following endorsement, to wit:

STATE OF ILLINOIS, *McLean County, ss:*

I have duly served this writ by reading and delivering a true copy of the same to Thomas J. Bunn & Mary E. Bunn, this 20th day of September, 1866.

H. A. EWING, *Sheriff.*

22 And afterwards, to wit, at a regular term of said court begun and held at Clinton, in said county, on Monday, the fifth day of November, A. D. 1866—

Present, Hon. Jno. M. Scott, judge; Henry S. Green, State's attorney; Alonzo D. McHenry, sheriff; Joseph J. Kelly, clerk.—

On the second day of said term, that being the 7th day of November, the following order was entered of record.

RUFUS W. ROBBINS *vs.* THOMAS J. BUNN ET AL. } Foreclosure.

And now on this day came the complainant by A. B. Bunn, his solicitor, and on his motion respondents are ruled to answer herein on or before the 1st day of March, next, and complainants have leave to reply and this cause is continued.

And afterwards, to wit, on the 28th day of February, 1867, Clifton H. Moore, one of said defendants filed in said court his separate answer to said bill, which is in the words and figures following, to wit:

The separate answer of Clifton H. Moore to the bill filed against him & others by Rufus W. Robbins.

This respondent saving & reserving to himself all & all manner of exception which can be taken to the many & manifest errors &
23 mis'tatements in said bill contained, for answer to so much of said bill as it is material for him to answer, answering, says:

That, as to the making of the said note & mortgage in said bill mentioned, he knows nothing, & therefere denies the same. And your respondent, further answering, charges the truth to be that no one thousand dollars was paid by the said Lewis Bunn, on the 22d day of Feb., 1856, and that the whole transaction, if any such was made, was for the sole & only purpose of hindering & delaying the creditors of the said Thomas J. Bunn from collecting their just debts.

Your respondent further charges the truth to be that said note is now fully paid & cannot be produced.

Respondent, further answering, denies that the copy of said mortgage & acknowledgement is correctly set out in the bill.

Respondent, further answering, denies that the said Lewis Bunn ever indorsed the said note to the said complainant delivered the same.

This respondent, further answering, denies that no part of the said note or the interest thereon was ever paid; but, on the contrary, avers that the said note is fully paid.

This respondent, further answering, expressly admits that he does claim a part of the land in said bill mentioned, to wit: the S. W. S. W. ¼ of sec. 27, T. 19, R. 3 E., which he holds by a patent title from the General

Government; that he entered said land at the land-office in Danville, Illinois, on or about the day of 1854, and has paid all taxes assessed upon the same for a space of at least seven years before the filing of this bill.

Respondent, further answering, denies that the said Thomas J. Bunn, at the time he executed the said mortgage, owned the land therein described, or had full right to sell convey the same; but, on the contrary thereof, this respondent insists that if the said Thomas J. Bunn had any interest in said land the same was falsely and fraudulently obtained, & of no effect as against the title of this respondent & so known by the said Robbins at the time he purchased the said mortgage.

This respondent, further answering, says ever since he purchased the said land the same has been assessed either in the name of this respondent, or in the name of Davis & Moore, & paid by this respondent, & no one has attempted to interfere with the legal rights of your respondent in the said forty acres.

And now, having fully answered, he prays to be discharged with his costs most unreasonably sustained.

C. H. MOORE.

C. H. MOORE, *pro se.*

To which answer the complainant afterwards, to wit, on the 8th day of November, 1867, filed the following exceptions:

STATE OF ILLINOIS. *De Witt County:*

Circuit court November term, A. D. 1867.

RUFUS W. ROBBINS
vs.
THO'S J. BUNN ET AL. } In chancery.

And the said complainant, by leave of the court, excepts to the following part of the answer of the defendant for the reasons herein set forth:

Complainant excepts to this part of the answer of the complainant, commencing after the figures 1856, in the 13th line from the top of the first page of the answer, and proceeding as follows: "And that the whole transaction, if any such was made, was for the sole purpose of hindering and delaying the creditors of the said Thomas J. Bunn from collecting their just debts."

Complainant excepts to the above part of the answer, for the reason that respondent does not say or charge in the said answer that, at the time of making the said mortgage, the mortgagor Bunn was indebted to any one except the said mortgagee. Nor does the respondent say that he is now, or was then, or ever has been, a creditor of the said Bunn, or that said mortgager was made or contrived to hinder or delay the said respondent or any one in privity with him in the collecting of any debt or claim that he had or might have had against the said Bunn.

Complainant excepts to the following part of the answer, commencing on the 12th line from the bottom of the 2d page of the answer as follows: "Respondent, further answering, denies that the said Thomas J. Bunn, at the time he executed the said mortgage, owned the said land therein described, or had full right to sell convey the same; but, on the contrary thereof, this respondent insists that if the said Thomas J. Bunn had any interest in said land, the same was false-

ly & fraudulently obtained & of no effect as against the title of this respondent, and so known to the said Robbins at the time he purchased the said mortgage."

Respondent excepts to the above part of the answer because it is too vague and indefinite, and does not set out or give this respondent notice of what the fraud consists, or wherein the said title of the said. Bunn was obtained by fraud or from whom it was obtained, and does
26 not set out facts to put this complainant upon notice sufficient to meet any proof that may be offered of any fraud in the said Bunn in obtaining said title; nor does it show in what way the said respondent is in any way prejudiced by said fraud, if any exists.

Complainant further excepts to the concluding charge of said answer as to the payment of taxes, and how the said land was assessed, and to that part that he says that "No one has attempted to interfere with the legal rights of your respondent in the said forty acres," for the reason that it is wholly immaterial.

Complainant also excepts to this part of the answer on the 2d page as follows: "And has paid all taxes assessed upon the same for a space of at least seven years before the filing of this bill," for the reason that it is wholly immaterial who has paid the taxes on the land for anything shown in this answer. And because the said parts of the said answer are immaterial to the issue in this cause, and are impertinent and too vague and indefinite to put this complainant upon notice to prepare proofs to meet the same, this complainant excepts to the same, and prays the court to cause the said excepted parts to be stricken from the said answer.

WILLIAMS & BUNN,
For Complainant.

And afterwards, to wit, on the 10th day of April, 1868, the complainant filed in the clerk's office of said court his amendment to the original bill herein, which said amendment is in words and figures following, to wit:

27 STATE OF ILLINOIS, *De Witt County, ss:*

Circuit court, May term, 1868.

RUFUS W. ROBBINS *vs.* THOMAS J. BUNN, MARY E. BUNN, AND CLIFTON H. MOORE.	In chancery. To foreclose mortgage.

And now the said complainant, by his solicitors, amends his original bill in this behalf, by leave of the court, and, by way of amendment, says that the said defendant, Clifton H. Moore, long after the said Thomas J. Bunn had located upon the said land in the original bill described, and had acquired a right to pre-empt the same, the said Moore pretended to enter the S. W. ¼ of the S. W. ¼ of section 27, town. 19, R. 3 E.; and the Commissioner of the General Land Office issued by mistake to said Moore a patent to said forty acres. But orator avers that said Bunn had previously entered the same under the laws of the United States and had paid for the same. Orator further shows unto your honor that, at the time said Moore made his pretended entry of said 40 acres, *that* he had full notice that the said Bunn claimed the right to said land as a pre-emption; and at the time said Moore obtained his

patent to said land he well knew that said Bunn had paid for said land as a pre-emptor, and that said Bunn was the owner of said land and entitled to a patent for the same.

Orator would further show that said Moore had, previous to his obtaining said patent, contested in due form of law the right of said Bunn to pre-empt said land before the register and receiver of the United States land office, at Springfield, Ill., and that the right of said Bunn to pre-empt said land was settled and adjudicated in favor of
28 said Bunn by said register and receiver. Said Moore appealed from the decision of said register and receiver to the Commissioner of the General Land Office, and the Commissioner reversed the decision of the register and receiver; and said Bunn appealed from the decision of the Commissioner to the Secretary of the Interior, and the Secretary of the Interior of the United States reversed the decision of the Commissioner and affirmed the decision of the register and receiver, which last decision has never been reversed, revoked, remanded, or in any wise set aside, but is in full force in law and equity, and the Commissioner of the General Land Office has ordered the said Moore to return his patent to said land to the General Land Office so that it might be cancelled and a patent issued to the same to the said Bunn. But said Moore has refused to return said patent and now holds the same in bad faith.

Orator would show that the title to said 40-acre tract from the United States as between said Bunn and said Moore has been adjudicated by the only court having jurisdiction of the matter, to wit, the register and receiver of the land office, and found to be in said Bunn, and that said Moore holds the legal title to said 40 acres in trust for said Bunn, and orator claiming under him.

Orator would further show that one David Davis claims to have some kind of title to or interest in some part of said land. But orator avers that said Davis has no title to or interest in any of said land as against the said Bunn or this complainant.

Orator prays that said Davis, who is a resident of the county of McLean, and State of Illinois, be made defendant hereto and summoned to answer this bill the same as the other defendants, and upon the final hearing in addition to the relief prayed for in the original bill
29 orator prays for a decree that said Clifton H. Moore convey to said Bunn the legal title to the said forty acres which the said Moore now holds as a trustee in bad faith for the said Bunn, and for a further decree cancelling, as a cloud on the title of said Bunn, any pretended title that said Davis may have to said lands.

Orator is informed that said Davis claim*ing* part of said land by virtue of a sale by the marshal of the southern district of Illinois, on a judgment in the circuit court of the southern district of Illinois, against some one who had an interest in said land subject to sale. And orator avers that said master's deed, which is of record, is a cloud upon the title of said Bunn, and would be a cloud upon the title of orator should he foreclose the same under his mortgage. Wherefore orator prays for a decree that said deed, as to all the tracts in the bill, be cancelled and set aside, as a cloud on the title of said Bunn in said land, and for equity & general relief. And as in duty bound, &c.

WILLIAMS & BUNN.
Compl'ts Sol's.

And, afterwards, to wit, on the 20th day of April, 1868, there was issued out of said court a summons, which is in the words and figures following, to wit:

STATE OF ILLINOIS, *De Witt County, ss:*

The people of the State of Illinois to the sheriff of McLean County, greeting:

We command you that you summon David Davis, impleaded
30 with Thomas J. Bunn, Mary E. Bunn, & Clifton H. Moore, if he shall be found in your county, personally, to be and appear before the circuit court of De Witt County, on the first day of the next term thereof, to be holden at the court-house in Clinton, in said De Witt County, on the first Monday of May next, to answer unto Rufus W. Robbins, in his certain bill of complaint, to foreclose a mortgage filed in said court on the chancery side thereof; and have you then and there this writ, with an endorsement thereon, in what manner you shall have executed the same.

Witness Joseph J. Kelly, clerk of said court, and the seal thereof this 20th day of April, A. D. 1868.

[SEAL.] JOS. J. KELLY, *Clerk.*

Which said summons was returned endorsed as follows, to wit:

STATE OF ILLINOIS, *McLean County, ss:*

I have duly served the within writ by reading and leaving a true copy of the same with George P. Davis, a white person, and member of the family, over 12 years of age, for the within named David Davis, at his usual place of residence, after explaining the contents thereof to him, this 23d day of April, A. D. 1868.

ED. M. PIKE, *Sheriff.*
By I. H. PIKE, *Deputy.*

And, afterwards, to wit, at a regular term of said court, begun and held at the court-house in Clinton aforesaid, on Monday, the 4th
31 day of May, A. D. 1868, that being the first Monday in said month—present, as before—

On Tuesday, the second day of said term, the following order was entered of record.

RUFUS W. ROBBINS
vs.
THOMAS J. BUNN ET AL. } For'closure.

And now comes the complainant, by R. E. Williams, his solicitor, and on his motion the respondents are ruled to answer the bill on or before Sept. 1st, next; and leave is given the complainant to reply thereto, and this cause is continued.

Whereupon the respondents, on the 27th day of August, A. D. 1868, came and filed their answer to said bill, which said answer is in words and figures following, to wit:

The separate answer of Clifton H. Moore to the amended bill filed against him in the circuit court of De Witt County, Illinois.

This respondent, saving and reserving unto himself all & all manner of exceptions that can be taken to the many errors & misstatements in said bill contained, for answer to so much of said amended bill as he is informed it is material for him to answer, answering, says:

That it is untrue that this respondent, long after the said Bunn had

located upon said land & acquired the right to pre-empt the same, pretended to enter said S. W. of the S. W. of sect. 27, T. 19, R. 3, & that the Commissioner issued, by mistake, a patent for said forty to
32 said Moore. But this respondent avers that his entry was first in point of time, & that when this respondent entered said tract of land no valid pre-emption was thereon, nor was there any notice filed in the land office at Danville, Illinois, that said land was claimed by said Bunn; nor did the said Bunn ever live on said land with the intention of making it his home; that no improvements whatever were on said land when this respondent entered the same, nor for some months afterwards.

Respondent, further answering, says that it is untrue that this respondent had notice of said Bunn's entry at the time this respondent entered said land. But this respondent avers the truth to be that said land was offered at public sale by the said land officer at Danville, Ills., & this respondent bid off the same at a few cents over $2.50 per acre, & no pre-emption claim was then filed or known to be in existence; that, as to what was decided at the land office at Springfield, he has no knowledge only that a patent was in due time sent this respondent for said S. W. S. W. of sect. 27, T. 19, R. 3 E.: which said patent, so delivered to this respondent, was the end of all adjudication at said Land Office, at Washington City, D. C., and to which said patent this respondent will refer on the hearing hereof.

Respondent, further answering, denies that he ever knew that the said Bunn was the owner of said forty acres, or lawfully entitled to a patent therefor; but, on the contrary thereof, respondent avers that the said Bunn never was a bona-fide pre-emptor on said land, nor was he ever entitled to a patent for said land.

This respondent, further answering, denies that the various land offices have decided that the said land belonged to said Bunn,
33 and not to this respondent; but that, on the contrary, the said General Land Office at Washington issued & delivered to this respondent a patent for said tract, & that your orator's title is the oldest, best, & only legal title to said tract. And that after a patent is issued no further adjudication can be made by the various land offices; and that respondent has paid all the taxes on said land for 7 years successively.

Affiant, further answering, says that it is not true that this respondent submitted his title to the adjudication of the Land Office at Washington; but that this respondent, as att'y for John P. Mitchell, who had entered the remaining part of the land in orator's bill named, did submit an argument for his client in said cause.

And now, having fully answered both complainant's bill & amended bill, both of which said answers he prays to be taken as one answer, and all allegations not admitted are expressly denied, he prays to be hence discharged with his reasonable costs herein most unjustly sustained.

C. H. MOORE, *Pro Se.*

The answer of David Davis to the bill filed against him & others by Rufus W. Robbins in the circuit court of De Witt County, Illinois.

This respondent, saving & reserving unto himself all & all manner of exception which may be taken to the many manifest errors & misstatements which are in said bill contained, for answer to so much as he is informed it is material for him to answer, answering, says—

That he has no knowledge about any of the statements in said
34 bill, nor has he any information or means of information about the claim of the said Bunn to the land in said bill. He, therefore, expressly denies each and every allegation in said bill in regard to said Bunn's pre-emption, or his entry, or his right to enter said land, and all other allegations made or intended to strengthen the complainant's title, or injure this respondennt's title to the S. E. of S. W. ¼ of sect. 27, T. 19, R. 3 E., and avers that said mortgage has been satisfied & merged in complainant's title, & that he has no right to file this bill, & alleges that the said Bunn never did have a pre-emption right to the above tract, nor did he ever enter the same & obtain a patent therefor, & that any claim or right he has, or pretends to have, against the said land was a fraud upon the rights of one John P. Mitchell, under whom this respondent claims.

This respondent, further answering, admits that he has an interest in one of the tracts in said bill mentioned, which was acquired in this manner:

One John P. Mitchell, without any knowledge of any pre-emption or other claim on said land by said Bunn, & before any such claim was made at the land office at Danville, Ills., entered said land, buying the same at public sale of said land officers at Danville, Ills., & paying them for said tract something over $2.50 per acre for said forty; that afterwards, & some time in the year 185 , a firm by the name of Avery, Butler & Cecil, in the circuit court of the United States, at Springfield, Illinois, obtained a judgment against the said John P. Mitchell and one Joel E. King for about the sum of $2,065.74 & costs of suit; that
afterwards an execution was issued on said judgment, & by the
35 marshal of said court levied on the lands in this answer described, amongst other lands, as the lands of John P. Mitchell, and was by him sold at public sale at Springfield, & was then & there bid off by the att'y for the plaintiff for the plaintiff's benefit, and that the tract claimed by respondent, after it was sold, not being redeemed, a deed was made by the marshal of said U. S. court, at Springfield, under the order of said court, to Theron R. Butler, one of the plaintiffs in said cause, who afterwards conveyed the said forty, to wit, S. E. S.W. ¼ 27, T. 19, R. 3 E., for a valuable consideration, to this respondent, who now owns & lawfully holds the same.

Respondent here avers that, at the time the said judgment was obtained, both plaintiff & defendant Mitchell supposed & believed that said Mitchell's title to said tract was good, & that the said Butler was an innocent purchaser, without any knowledge of said Bunn's claim on said land; that there was no actual or constructive notice of the claim of said Bunn to said forty acres.

This respondent, further answering, says that, after the said land was so entered by the said Mitchell, the said Mitchell, or those claiming under him, have paid all the taxes on said land for seven successive years. This respondent, therefore, the benefit of the statute in such cases made & provided.

This respondent, further answering, says that all other allegations in said bill not herein admitted are expressly denied the same as if separately replied too. And now, having fully answered, he prays to be discharged with his costs.

DAVID DAVIS.

36 C. H. MOORE, *Sol.*

And afterwards, to wit, on the 19th day of November, 1858, the com-

plainant came and filed his replication to said answer; which said replication is in words and figures following, to wit:

Of the May term, A. D. 1867, of the circuit court of De Witt County.

STATE OF ILLINOIS,
County of De Witt, ss:

RUFUS W. ROBBINS
vs.
T. J. BUNN ET AL. } In chancery.

And now comes the said complainant, by his solicitors, Williams & Burr, and, for replication to the separate answer of C. H. Moore & David Davis, the defendants in said cause, filed herein, says that the matters and things in said answer set forth, except so far as the same admit the allegations of complainant's bill, are incorrect and untrue, and that the allegations of said bill are true, as complainant will prove on a hearing herein.

WILLIAMS & BURR,
Solicitors for Complainant.

And afterwards, to wit, at a regular term of said court begun and held at the court-house, in Clinton aforesaid, on Monday, the 3d day of May, A. D. 1869, that being the first Monday of said month—
37 present, Hon. John M. Scott, judge; J. H. Rowell, State's attorney; A. D. McHenry, sheriff; W'm L. Chambers, clerk—on Tuesday, the second day of said term, the following order was entered of record, to wit:

R. W. ROBBINS
vs.
T. J. BUNN ET AL. } For'closure.

This cause is referred to the master in chancery to take testimony herein.

And afterwards, to wit, on the 28th day of May, that being the 25th day of said term, the following was entered of record, to wit:

R. W. ROBBINS
vs.
T. J. BUNN ET AL. } Foreclosure.

This day came the complainant, by Williams & Burr, his solicitors, and the respondents, Thomas J. Bunn & Mary E. Bunn, having been three times solemnly called, came not, but herein wholly make default, and thereupon complainant's bill is taken for confessed as against them.

And now this cause coming on to be heard upon the bill, answer of the other respondents, and replication thereto, and the court, not being sufficiently advised, doth take the same under advisement.

38 And afterwards, to-wit, on the 4th day of June, that being the 32nd day of said term, the following order was entered of record:

R. W. ROBBINS
vs.
T. J. BUNN ET AL. } Foreclosure.

It is ordered by the court that the hearing of this cause be continued, and leave is hereby given to either party to introduce new evidence.

And afterwards, at a regular term of said court, begun and held at the court-house in Clinton, in said county, on Monday, the first day of November, A. D. 1869, that being the first Monday in said month, and present as last aforesaid.

On Friday, the 19th day of said term, the following order was entered of record, to-wit:

RUFUS W. ROBBINS
vs.
T. J. BUNN ET AL. } For'closure.

It is ordered by the court, that this cause be referred to the master in chancery, to make the computation of the amount due herein.

And afterwards, to-wit, on the 23d day of said term the master in chancery filed his report of the amount due herein, which was approved by the court, and ordered to be filed; and which is in words and figures following to wit:

39 In the circuit court, November Term, A. D. 1869.

STATE OF ILLINOIS, *De Witt County:*

RUFUS W. ROBBINS
vs.
T. J. BUNN ET AL. } In chancery. Bill to foreclose mortgage.

To the Hon. John M. Scott, judge of said court:

The undersigned, having been by the court appointed to make computation in the above-entitled cause, would respectfully report that he has performed the duty assigned him, and finds that there is now due on the note and mortgage on file in said cause the sum of eighteen hundred and twenty-four dollars and fifty cents, ($1,824.50.)

And now, having fully reported, he submits this his report to the court for approval.

Nov. 19th, 1869.

MICHAEL DONAHUE,
Master in Chancery.

On the same day the following decree was entered of record, to wit:

RUFUS W. ROBBINS
vs.
THOMAS J. BUNN, MARY E. BUNN, CLIFTON H. MOORE, & DAVID DAVIS. } Bill in chancery to foreclose a mortgage.

And now this cause coming on, and it appearing to the court that the defendants, Thomas J. Bunn and Mary E. Bunn, have been duly
40 served with process more than ten days before the commencement of this court, and the said Thomas J. Bunn and Mary E.

Bunn having failed to appear, and plead, answer, or demur to the said bill, on motion of the solicitor for complainant, a default is entered against them, and a decree pro confesso is entered against them, and as to them the bill is taken as true.

And the cause coming on to be heard on the bill, amended bill, with their exhibits, and the answers of the defendants, Clifton H. Moore and David Davis, and the replication of the complainant to said answers, and the default of said Bunn and wife, and the proofs, both written and oral, as set forth in the certificate of evidence; and now the court, being fully advised, finds that the said Thomas J. Bunn made the note as stated in the bill, and that the said Thomas J. Bunn and Mary E. Bunn made and acknowledged and delivered the mortgage as stated in the bill, and that said Lewis Bunn, the payee of said note, sold and endorsed the same to the complainant, as stated in the bill, and that said note remains wholly unpaid, and the amount of said note, with interest, is now due and owing from the said Thomas J. Bunn to the complainant. And because the court is not advised as to the amount due on said note and mortgage, the court refers it to the master in chancery, to report the amount due on said note. And the said master having made his report that there is now due and unpaid on said note the sum of one thousand eight hundred and twenty-four dollars and fifty cents, which report is approved by the court. And now the court, being fully advised, finds that there is now due and owing upon said mortgage, from the said Thomas J. Bunn to the complainant, said sum of $1,824.50.

41 The court further finds that said mortgage is not a lien on the S. W. ¼ of the S. W. ¼ of section 27, town. 19 N., R. 3 E 3d p. m., and as to said S. W. ¼ of the S. W. ¼ of sec. 27, town. 19 N., R 3 E., the bill is hereby dismissed.

The court further finds that the said mortgage is a lien on all the other lands described in said mortgage and bill, to wit: The south half of the southeast quarter, and the S. E. ¼ of the S. W. ¼, all in section twenty-seven, town. 19 N., R 3 E. 3d p. m.

And it is ordered and decreed by the court, that unless the defendant, Thomas J. Bunn, or some one for him, shall, within twenty days from this date, pay to the complainant the said sum of $1,824.50, with interest thereon at the rate of six per cent. per annum from and after this date, together with his costs in this behalf expended, that the master in chancery in this court shall, after having advertised in some newspaper published in De Witt County, Illinois, the time, place, and terms of sale, together with a description of the property to be sold, for at least 20 days before the day of sale, proceed to sell, at the court-house door of said De Witt County, between the hours of 9 o'clock a. m. and 4 o'clock p. m. of the day of sale, said south half of the southeast quarter; also the S. E. ¼ of the S. W. ¼ of section 27, town. 19 N., R. 3 E. 3d p. m., or so much thereof as may be necessary to pay said sum so found to be due to complainant, with interest thereon as beforesaid, and all the costs of this proceeding, including the costs of sale, and shall pay the surplus, if any, to the said Thomas J. Bunn, and shall issue to the purchaser or purchasers a certificate or certificates of purchase, entitling him or them to a deed, unless the land shall be redeemed within

42 fifteen months from the day of sale, and shall make report to this court of his proceedings herein. And this cause is continued for further orders in the premises.

Approved:

JOHN M. SCOTT, *Judge.*

And afterwards, to wit, on the day and year last aforesaid, the following was entered of record, to wit:

RUFUS W. ROBBINS
vs.
THOMAS J. BUNN, MARY E. BUNN, CLIFTON H. MOORE, & DAVID DAVIS. } For'closure.

This day came again the complainant, by Williams & Burr, his solicitors; and the respondents, David Davis and C. H. Moore, by C. H. Moore, their solicitor; and both complainants and respondents pray an appeal to the Supreme Court, which is granted by consent, without bond being filed by either party, and tender their certificate of the evidence herein, and ask that the same may be signed and made a part of the record in this cause, and it is done.

Which said certificate of evidence is in words & figures following, to wit:

Circuit court, November term, 1869.

ROBBINS
vs.
BUNN ET AL.

43 Be it known that, on the hearing of this cause, the complainant introduced, as evidence on his part, the note & mortgage herein, and also the copies of proceedings at the land offices—one certified by the Commissioner of the Gen'l Land Office & the other by the register of the land office at Springfield.

Copy of proceedings certified by the Commissioner of the Gen'l Land Office.

"No. 19160.] LAND OFFICE AT DANVILLE, ILLINOIS,
"*February 20th*, 1856.

"It is hereby certified that, in pursuance of law, Thomas J. Bunn, of De Witt County, State of Illinois, on this day purchased of the register of this office the lot or south half of the southeast qr. and south half of southwest ¼ of section No. twenty-seven, in township No. nineteen N., of range No. three east, containing one hundred and sixty acres, at the rate of two dollars and fifty cents per acre, amounting to four hundred dollars, for which the said Thomas Bunn has made payment in full, as required by law.

"Now, therefore, be it known that, on presentation of this certificate to the Commissioner of the General Land Office, the said Thomas Bunn shall be entitled to receive a patent for the lot above described.

"JOHN N. DRAKE, *Register*."

(Written across the face in red ink:) G. L. O. Cancelled. See letter to R. & R., Sep. 30th, 1858. G. L. O. Reinstated. See letter to R. & R., June 29th, 1860.

On the back of the foregoing certificate is the following words and figures, to wit:

44 "G. L. O. Cancelled. Illegal pre-emption. R. & R. directed to notify party to apply for return of purchase-money. (Duplicate receipt herewith.) See letter to R. & R., Sept. 30th, 1858. B. F. S.

"G. L. O. Reinstated June 24th, 1860, in pursuance of Secretary's letter of June 22d, 1860. B. F. S.

"Duplicate rec't 19160. Returned to Mr. Bunn. See his letter to this office dated April 7th, 1857."

Copy of affidavit required of pre-emption claimant.

I, Thomas J. Bunn, claiming the right of pre-emption under the provisions of the act of Congress entitled "An act to appropriate the proceeds of the sale of the public lands and to grant pre-emption rights," approved September 4th, 1841, to the S. ½ S. E. qr. & S. ½ S. W. quarter of section number 27, of township number 19 N., of range number 3 east, subject to sale at Danville, Illinois, do solemnly swear that I have never had the benefit of any pre-emption under this act; that I am not the owner of three hundred and twenty acres of land in any State or Territory of the United States, nor have I settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to my own exclusive use or benefit, and that I have not, directly or indirectly, made any agreement or contract in any way or manner with any person or persons whatsoever, by which the title which I may
45 acquire from the Government of the United States should endure, in whole or in part, to the benefit of any person except myself.

THOMAS J. BUNN.

I, William E. Russell, of the land office at Danville, Ill's, do hereby certify that the above affidavit was taken and subscribed before me this 20th day of Feb., A. D. 1856.

W'M E. RUSSELL, *Rec'r.*

DEPARTMENT OF THE INTERIOR,
June 22nd, 1860.

SIR: In the case submitted with your report of 27th Feb'y last, wherein C. H. Moore contests the pre-emption entry of Thomas J. Bunn in the late Danville district, Illinois, I concur in the conclusions of the register & receiver at Springfield of the 20th January, 1858, sustaining the entry of Bunn. I regard this case as simply one between the United States and the pre-emptor, Moore having made his adverse entry at the time when the records of the land office showed that Bunn was a claimant for the same land by pre-emption, and, upon complying with the requirements of the act Sept. 4th, 1841, would have a superior right.

Under the circumstances as shown by the testimony brought out in the re-investigation, there can be no doubt of the bona fides of Bunn, and the connection between his first acts and subsequent settlement and improvements I consider sufficient to warrant the issueing of a patent in his favor.

46 Herewith I return the papers in the case.

Very respectfully, your ob't serv't.

J. THOMPSON,
Secretary.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

GENERAL LAND OFFICE, *June 29th*, 1860.

REGISTER & RECEIVER,
Springfield, Illinois.

GENTLEMEN: The Hon. Sec'y of the Interior having decided the case

of T. J. Bunn vs. C. H. Moore, embracing the S. ½ S. E. ¼, and S. ½ S. W. ¼ 27, 19, 3, in favor of Bunn, I have to inform you of that fact, and to say further that a patent having been issued to Moore for a part of this tract, viz: W. ½ S. W. ¼ 27, 19, 3, Mr. Bunn can make application to the United States courts for the district in which the land is situated, to have the patent set aside. When that is done, then a patent will issue to him, Bunn, for the entire tract. Should he prefer, however, to take the remaining 120 acres, you are hereby authorized to issue
47 a new certificate for that portion not encumbered by the patent; in that event you will direct Mr. Bunn to make application for the return of this purchase-money advanced for the 40 acres already patented to Moore.

This patent, above referred to, was issued to Moore during the interim between the cancellation of Bunn's pre-emption entry, and the appeal of Bunn from the decision of this office. That decision being now reversed by the Hon. Sec'y of the Interior.

I have this day written to Moore, calling upon him to return the patent to this office, that a patent may issue to Bunn for the entire tract.

Respectfully, &c.

JOS. S. WILSON, *Commissioner.*

GENERAL LAND OFFICE, *June* 29, 1860.

C. H. MOORE,
Clinton, Illinois.

SIR: The Hon. Secretary of the Interior having decided the case of T. J. Bunn vs. C. H. Moore, in favor of Bunn, I have to request you to return to this office, cash patent, No. 17864, embracing the W. ½ S. W. ¼ sec. 27, 19, 3, Springfield, late Danville, Ill's, which was transmitted to you on the 21st February, 1859.

Very respectfully,

JOS. S. WILSON, *Commissioner.*

48 In the matter of the pre-emption claim of Thomas J. Bunn, held on the 20th day of January, 1858, before the register & receiver of the land office at Springfield, Illinois, in pursuance of an order from the Commissioner of the General Land Office, under date of October 13th, 1857, ordering a re-investigation of said Thomas J. Bunn's right to a pre-emption on the S. ½ of the S. E. ¼, and the S. ½ of the S. W. ¼ of section 27, town. 19 N., range 3 E. of the 3d principal meridian, held at the instance of C. H. Moore.

After due notice had been given, the parties appeared, and the following evidence was given, to wit:

Joseph P. Winslow, Peter Folsom, and George D. Smallwood, after being duly sworn, deposes and says:

PETER FOLSOM, being called on the part of the plaintiff, says:

Ques. 1. State your name, age, occupation, and place of residence.

Ans. My name is Peter Folsom; age, 40 years; occupation, surveyor; residence, Bloomington.

Ques. 2. If you are acquainted with Thomas J. Bunn, state when & where; how long you have known him.

Ans. I have known him for ten years in the State of Illinois.

49 Ques. 3. Where did Thomas J. Bunn reside during your acquaintance with him?

Ans. Most of the time in Bloomington.

Ques. 4. Where has Thoms J. Bunn resided for the last 2 or 3 years?

Ans. According to the best of my knowledge he has resided at Bloomington. He may have been gone some portion of the time, say 2 or 3 month' at a time.

Ques. 5. If Thomas J. Bunn has a family, where do they reside?

Ans. I understand that he has a family. They reside at Bloomington.

Ques. 6. How often, during the last 3 years, have you seen Thomas J. Bunn, and where was he when you saw him?

Ans. I cannot tell how often I may have seen him, but when I have seen him it was usually at Bloomington, the same as I have seen other persons at Bloomington.

Ques. 7. In whose employ, at Bloomington, was Thomas J. Bunn, during the last 3 years?

Ans. I do not know who employed him, but I have seen him at Hardy's store this winter and last fall. I have also seen him at Mr.
50 Eager's store previous. How long that he was at Eager's store I am not able to tell, whether it was 1 or 2 years.

Ques. 8. In what capacity was Thomas J. Bunn acting while at Eager's & Hardy's?

Ans. As clerk.

Ques. 9. Where was Thomas J. Bunn during the winter of 1855 & '56?

Ans. I don't remember particularly. I am quite certain that I saw him at Bloomington in the fall of 1855. I am not certain about the winter.

Cross-examination by def's att'y:

Ques. 1. Are you acquainted with the circumstances of Mr. Bunn, as to his property?

Ans. Not particularly.

Ques. 2. State your best knowledge as to his property.

Ans. According to my best knowledge he is not a man of much property.

Ques. 3. During your acquaintance with Mr. Bunn, within the last 2 or 3 years, state whether you know of his doing business on his own account, or whether he has acted in the capacity of clerk. State all you know upon that subject.

51 Ans. I don't know that he has been in business for himself for the last 2 or 3 years.

Ques. 4. State whether you know of Thomas J. Bunn being employed in business on his own account previous to the time spoken of in your last answer, and of his not being able, since that time, to pay his debts, and all you know about there being judgments and executions against him.

Ans. He was in business for himself at Concord, McLean Co. He was in company with some one else, I believe. As to my knowledge about it I do not know, but common report was that he failed. I have no knowledge of any judgments or executions against him.

Ques. 5. Have you any knowledge, from report or otherwise, that immediately upon Thomas J. Bunn's procuring his pre-emption claim in question, that J. C. Walker sent an execution to De Witt Co., for the purpose of having it levied upon the land in question? State all you know upon the subject, if anything.

(Question objected to by plaintiff.

The answer was waived by def'ts att'y.)

PETER FOLSOM.

JOSEPH P. WINSLOW called & says:

Ques. 1. State your name, age, occupation, and place of residence.

Ans. My name is Joseph P. Winslow; age, 38 years; house-car-
52 penter by trade; residence, Clinton, De Witt Co., Ill's.

Ques. 2. If at any time you were acquainted Thomas J. Bunn, state where you first knew him, and how long you have been acquainted with him.

Ans. The 29th day of November, 1855, was the first time I ever saw him, and have known him since.

Ques. 3. If at any time you have done carpenter-work for Thomas J. Bunn, state where it was and what work you done.

Ans. I commenced on the 29th of November, 1855, to build him a house. The house was 14 by 16 feet, built of plank, with shed-roof, tounged & grooved floor, stripped all round, with board-roof, battened-door, with mineral knob, & glass windows of 8 by 10 lights.

Ques. 4. Was there any chimney or flue in said house?

Ans. There was neither chimney or flue of brick, but there was a hole cut through the side of the house lined with sheet iron.

Ques. 5. Do you call the building a house or shanty?

Ans. I should call it a house.

Ques. 6. How long after this house was built was you in the habit of passing & repassing in the neighborhood of where it was built?

53 Ans. Some six or eight months.

Ques. 7. Can you give the numbers of the land on which said house was built, or the location of said house?

Ans. I do not know.

Ques. 8. Who pretended to own the land on which said house was built at the time you was building it?

Ans. Mr. Bunn employed me to build the house, and said that he owned the land.

Ques. 9. How long was Thomas J. Bunn in the neighborhood of this house, or in the co. of De Witt?

Ans. I cannot tell exactly; as near as I can tell about two weeks at that time.

Ques. 10. Was he there again after this? If yes, how long & where did he stay or reside?

Ans. I do not know.

Ques. 11. During the 8 months immediately after the building of said house did Thomas J. Bunn with his family reside therein? If yes, how much of that time did he with his family reside in the house you built for him?

54 Ans. I never saw him and his family there but two different times, and that was within one week.

Ques. 12. How long after said house was built was it abandoned by said Bunn & his family?

Ans. I cannot tell exactly.

Ques. 13. At what time did Bunn and his family occupy said house, and how many weeks do you know they were there?

Ans. I do not know that they were there more than 1 week.

Ques. 14. Have you passed said house frequently since said 8 months? If yes, have you seen said Bunn and his family in said house?

Ans. I have passed the house 3 times since the 8 months spoken of, & did not see Bunn and his family there.

Ques. 15. If Bunn and his family had made said house their permanent residence after the building of the same would you have known it?

Ans. I think I should.

Ques. 16. What improvements was on the ground when you built said house—when you commenced the same on November 29, 1855?

55 Ans. There was a shanty consisting of two forks set in the ground; there was a pole resting on the posts or forks and covered with boards nailed on the pole.

Ques. 17. Did this shanty form a residence for a family?

Ans. I should think not.

Ques. 18. Could any adult person stand up in it?

Ans. I do not know.

Ques. 19. In building that house you built for Bunn what was done with his shanty?

Ans. We tore it down and put the lumber into the house.

Ques. 20. Did any portion of said shanty, as it was placed on the ground, form any part of any permanent improvement on said land?

Ans. I think not.

Cross-examined by def'ts att'y:

Ques. 1. What time in the year did you build the house spoken of in your direct examination?

56 Ans. I commenced it on the 29th of November, 1855.

Ques. 2. How long after you commenced the house did you tear down the shanty spoken of?

Ans. About 3 days.

Ques. 3. Was the lumber in that shanty used in building the house, and what kind of lumber was it?

Ans. It was oak lumber and was used in the house.

Ques. 4. Was it suitable lumber to be used in building a house?

Ans. It was.

Ques. 5. Explain what you mean in your last answer in your direct examination when you say that this shanty formed no permanent improvement to said land?

Ans. I meant that it formed no permanent improvement because it was torn down and put into the house, and not because the lumber was not good.

Ques. 6. W*as* you in Mr. Bunn's house at any time after he moved there with his family; if so, describe as near as you can what furniture he had in the house?

57 Ans. I was there twice while his family was there. I saw a bedstead, bed & bedding, 3 or 4 chairs, stove, small table, trunk, dishes, & some cooking utensils.

Ques. 7. Did you see any axe fire-wood about the house? If so, state how much.

Ans. I saw an axe and wood-pile, but cannot say how much.

Ques. 8. Was there any contract with you in relation to shingling the house; if so, what was the reason it was not done?

Ans. There was a contract with me to put a shingle roof on the house.

Ques. 9. What improvements were on the land and about the house which you built for Mr. Bunn? State at any time subsequent to the time you built the house in question.

Ans. I think there was about 100 acres broke up and sowed to wheat in 1856. I saw the wheat growing in the spring of 1857.

Ques. 10. State what you know of the situation of the tract of land in reference to timber and settlement at the time you built the house.

Ans. I think about three miles from timber, and I should think a mile or two from the nearest house.

58 Ques. 11. In the fall & winter of 1855 & '56, state to your best knowledge whether it was a mild or an extremely cold and unpleasant winter.

Ans. To the best of my knowledge it was an extremely cold and unpleasant winter.

Ques. 12. At the time you visited Mr. Bunn's house in Dec'r, 1855, state according to your best knowledge and information whether Mr. Thomas J. Bunn was a married or a single man.

Ans. According to the best of my knowledge and information he was a married man.

Ques. 13. State what his family consisted of.

Ans. Himself and wife.

Ques. 14. From what you saw when you *was* there what is your opinion as to the health of his wife?

Ans. I should think that she was not a healthy woman at that time.

Ques. 15. From what you could see from the health of his wife and the distance from timber and neighbors, during the winter season such as December, 1855, and the winter of 1856, would it have been

59 safe to have left a woman there alone in the house you built for 2 or 3 days at a time.

Ans. I should not think it would be safe.

Ques. 16. Did you go to Danville with Mr. Bunn for the purpose of proving up his claim; and, if so, when, and why did you go at that time?

Ans. I did go to Danville with Mr. Bunn for the purpose of proving up his claim. We started on the 11th day of Dec., 1855. Mr. Bunn had the impression that it had to be proved up within 30 days was the reason why he hurried to go at that time.

Direct examination resumed:

Ques. 1. Have you seen Bunn on his pre-emption claim since your return from Danville with him; if yes, how often?

A. I have not seen him on it since.

Ques. 2. Whose furniture was it that you saw in Bunn's house?

Ans. I do not know any other owner for it except Mr. Bunn.

Ques. 3. Was there ever any fence around the land broken or planted?

Ans. There was not.

60 Ques. 4. How long was it after you built said house *was it* that it fell down?

Ans. I don't know anything about it.

Adjourned to the 21st inst., at 9 o'clock.

Met pursuant to adjournment.

Cross-examination again by def't's att'y:

Ques. 1. Describe the timber of which the house you built for Thomas J. Bunn was composed.

Ans. There was 2 sills 16 feet long, 5 by 6 inches.

Ques. 2. Was the house built in a good substantial manner for the size of it?

Ans. It was built in as substantial a manner as we generally build a plank house, except the roof.

Ques. 3. You say in your former answer that the house was planked and stripped—describe what you mean by the word stripped?

Ans. What I meant by it was that there was strips of boards nailed on the cracks.

61 Ques. 4. At the time you last saw Thomas J. Bunn and family living in said house *was* you there again?

Ans. I cannot tell exactly how long, but should say it was over 3 months.

Ques. 5. At the time mentioned in your last answer as being at the house, state whether Thomas J. Bunn was then living there, or was there, or whether his effects or household goods had been removed, and who occupied the house.

Ans. Neither he nor his family *was* there. The same furniture and household goods were there. There was no one occupying the house.

Ques. 6. *Was* you there at any time after the time last spoken of? If so, state who occupied the house, if any one, and what business said occupants were engaged in.

Ans. I have been there since but did not see anybody in the house.

J. P. WINSLOW.

GEORGE D. SMALLWOOD called:

Ques. 1. State your name, age, occupation and place of residence.

62 Ans. My name is George D. Smallwood; age, 47 years; residence, DeWitt Co., Ills.; occupation, farmer, and surveyor occasionally.

Ques. 2. Upon what tract of land is Thomas J. Bunn's house situated?

Ans. It is situated upon S. W. ¼ of the S. W. ¼ of section 27, town. 19 N., range 3 east

Ques. 3. How far is that tract of land from the Illinois Central Railroad?

Ans. I think 4½ miles.

Ques. 4. Who owns the lands round section 27, town. 19 N., R. 3 E.?

Ans. The lands joining on the west and east are railroad lands, and on the north and south is railroad also.

Ques. 5. How far do you live from the land claimed by Thomas J. Bunn?

Ans. I live 3 miles north & one mile west.

Ques. 6. Did Bunn usually go past your house in going from the timber or from Clinton to the land he claimed?

Ans. Yes, sir; he went by there and stopped at my house a time or two.

63 Ques. 7. How long was Thomas J. Bunn on this land or in that neighborhood with his family?

Ans. I never saw Thomas J. Bunn's family that I know of, and I never saw Thomas J. Bunn there on the land but the one time—not to my knowledge; that was previous to any building there. I do not know how long that he was there. I never saw him there.

Ques. 8. If Thomas J. Bunn had commenced residing on said land in Dec'r, 1855, and continued to reside on the same for twelve months thereafter, would you have known it?

Ans. Yes, sir, I think I should.

Ques. 9. From general reputation and facts that you know, how long did Bunn stop or stay in the neighborhood of this land?

(Objected to by def't's att'r'y.)

Ans. From what I could understand at the time it could not have been more than 2 weeks.

Ques. 10. Were you present at a trial in the circuit court of DeWitt

Co., at its fall term in 1857, between Lewis Bunn and John Spinar in regard to sowing wheat on this land claimed by Thomas J. Bunn? If yes, what work did Lewis Bunn prove that he had done on said land; & was Lewis Bunn & Thomas J. Bunn both personally present in said court at said trial?

64 (Objected too by def't's att'y.)

Ques. 11. Who got the breaking done on said land?

Ans. I don't know that I can answer all of that question; I don't think that I know anything about it myself personally.

Ques. 12. To whom did the men send to for their pay for breaking the same?

Ans. I was going to Bloomington. I think it was last winter my bro. wanted me to call on Lewis Bunn for some money for prairie breaking, The prairie breaking was broke on the claim of Thomas J. Bunn.

Ques. 13. Who paid for sowing the wheat on the claim of Thomas J. Bunn?

Ans. I cannot answer that only in the question that is rejected.

Ques. 14. Who did Thomas J. Bunn at Clinton say paid for the wheat and sowing the same on his claim?

Ans. My impression was, from the evidence, that Mr. Lewis Bunn furnished the money to purchase the wheat sown on the premises claimed by Thomas J. Bunn, and also, putting in the wheat on said claim.

(The question and answer objected to by def't's att'y.)

65 G. D. SMALLWOOD.

It is admitted that the records in the Land Office shows Moore & Mitchell entered the lands claimed by Thomas J. Bunn November 15th, 1855, & that Bunn entered them on the 20th day of February 1856, both entries made with money.

We are of the opinion that the contestant in this case has failed to sustain the allegations set forth in his affidavit, and that the pre-emptor is entitled to his land.

JOHN CONNELLY, SEN'R, *Register.*
EDWARD CONNOR, *Receiver.*

Attached to the foregoing is the following certificate:

GENERAL LAND OFFICE, *March 29th*, 1861.

I, J. M. Edmunds, Commissioner of the General Land Office, do hereby certify that the annexed copies are true and literal exemplifica- from the records & files of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] J. M. EDMUNDS,
Commissioner of the General Land Office.

66 *Copy of the proceedings certified by register of land-office at Springfield.*

No. 1.

Thomas J. Bunn, of McLean County, in the State of Illinois, a citizen of the United States, over the age of twenty-one years, states that, on the 8th day of November, A. D. 1855, made a commencement and im-

provement on the S. ½ of the southwest quarter, and on the south half of the southeast quarter of section twenty-seven, (27,) township (19) nineteen, range 3 east, in the district of lands subject to sale at Danville, Illinois, containing 160 acres of land. I do hereby declare my intention to claim said tract of land as a pre-emption right under the act of Congress of the 4th of March, A. D. 1841, and any act amendatory thereto.

Given under my hand this 8th day of November, A. D. 1855.

(Signed) THOMAS J. BUNN.

Attest:

E. J. IVES.

No. 2.

I, Thomas J. Bunn, claiming the right of pre-emption, under the provisions of the act of Congress entitled "An act to appropriate the proceeds of the sale of the public lands and to grant pre-emption rights, approved September 4th, 1841, to the S. ½ of S. E. ¼ and S. ½ of S. W. ¼ of section number 27, of township number 19 N., of range 3 east, subject to sale at Danville, Ill's, do solemnly swear that I have never had the benefit of any right of pre-emption under this act. That I am
67 not the owner of three hundred and twenty acres of land in any State or Territory of the United States, nor have I settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to my own exclusive use or benefit, and that I have not, directly or indirectly, made any agreement or contract in any way or manner with any person or persons whatsoever by which the title which I may acquire from the Government of the United States should enure in whole or in part to the benefit of any person except myself.

(Signed) THO'S J. BUNN.

I, Wm. E. Russell, of the land office at Danville, Ill's. do hereby certify that the above affidavit was taken and subscribed before me this 20th day of February, A. D. 1856.

W'M E. RUSSELL, *Rec'r.*

No. 3.

G.] DEPARTMENT OF THE INTERIOR,
GENERAL LAND-OFFICE,
Sept'r 11th, 1868.

REGISTER & RECEIVER,
Springfield, Ill's.

GENTLEMEN: Under the date of the 22nd ult. the application of C. H. Moore for a rehearing in the Danville contested case of Thomas J Bunn vs. C. H. Moore and John P. Mitchell was submitted to
68 the Department proper, and on the 5th inst. the Hon. Acting Secretary of the Interior declined to re-open this case, for reasons stated in his letter, a copy of which is herewith enclosed. Now in order that the decision of the Secretary of the Interior of June 22d, 1860, awarding the S. ½ S. E. ¼ & S. ½ S. W. ¼, sec. 27, T. 19, R. 3 E. to Tho's J. Bunn may be carried out, you are requested to call upon C. H. Moore for the return of the patent inadvertantly issued to him for the S. W. ¼ sec. 27, and covered by Danville cash entry No. 17864.

You will report your action in this matter in a special letter referring to this as G, by its date.

Very respectfully,

JOS. S. WILSON,
Commissioner.

No. 4.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., 5th Sept., 1868.

SIR: I have received your letter bearing date the 22nd and 28th ultimo, and accompanying papers in reference to the contested case of Thomas J. Bunn vs. C. H. Moore & John P. Mitchell. It appears from the papers that said Bunn claimed a pre-emption right to the S. ½ of S. E. ¼ & S. ½ S. W. ¼, sec. 27, T. 19, R. 3 E., situate in De Witt County, Illinois, and on the 20th Feb'y, 1856, paid therefor to the receiver at Danville the sum of four hundred dollars. On the 15th Nov'r, 1855, said Moore had entered the S. W. ¼ of said S. W ¼, and said Mitchell the
69 remainder of the lands covered by the pre-emption claim of said Bunn. Said entries were subject to the outstanding claim of Bunn and were liable to be cancelled should its validity be recognized.

The local officers decided in his favor and your office against him. From your decision an appeal was taken to the Secretary of the Interior, but in the meantime Moore secured a patent for the tract which he claimed.

The Secretary, on the 22nd day of June, 1860, reversed your decision and affirmed the paramount right of Bunn to the lands covered by his claim, but for some unexplained cause no patent has been issued to him for the lands or any part thereof.

It is stated that said Bunn has since transferred his interest in the lands, and Mitchell's title to the whole or a part thereof has been sold under execution.

You inform me that the question of title has been involved in much litigation in the courts of Illinois. Mr. Moore wrote to you on the 4th June, 1867, in regard to a new hearing in the case, and on the 6th ult. he made a formal application for it. He transmitted as "additional evidence" a certified copy of a deposition of Bunn and his wife, taken in a suit pending in a court in the State of Illinois as to the said S. W. ¼ of S. W. ¼ for which patent had been issued to him, that he did not "desire to move further in that." The case appears to have been originally considered carefully by the Department and upon briefs furnished by each of the parties. The present application does not come within the rules heretofore observed in granting a rehearing. The evidence of Bunn would be cumulative as his right has been transferred. I am of opinion that, independently of those rules and
70 even if so long a time had not transpired, it would be improper to disturb the deliberative action of the Department upon such a state of facts as the application presents. It is therefore overruled. The original decision should be carried into effect, at least so far as a patent has not been issued. The entry of Mitchell in conflict therewith should of course be cancelled.

I am, sir, very respectfully, your ob't serv't.

W. T. OTTO, *Acting Secretary.*

Hon. JOS. S. WILSON,
Com'r Gen'l Land Office.

U. S. LAND OFFICE AT SPRINGFIELD, ILL'S,
October 29th, 1869.

I, William F. Elkin, register of the U. S. Land Office at Springfield, Ill's, do hereby certify that the foregoing papers, numbered respectively from 1 to 4, inclusive, are true copies of the originals on file and remaining among the records of my office.

Given under my hand this 29th day of October, 1869.

W'M F. ELKIN, *Register.*

[5 cts. U. S. int. rev. stamp, cancelled.]

To all of which the said Moore, for himself and the said Davis, then and there objected, which said objection was overruled by the court & the defendants then & there excepted & the complainant then rested.

The defendant, Moore, then introduced a patent to him from the Gen. Government for S. W. S. W. 27, 19, 3 E., dated Feb. 1st, 1859, (see
71 agreement page 74,) & register's certificate of entry, as follows, to wit:

UNITED STATES LAND OFFICE, SPRINGFIELD, ILLINOIS,
Register's Office, October 15th, 1856.

I, John Connelly, s'r, register of the land office, at Springfield, Illinois, do hereby certify that, on the fifteenth day of November, in the year A. D. 1855, John P. Mitchell purchased of the General Government, at the land office, formerly at Danville (now Springfield,) Ills., the southeast q'r of southwest q'r, & east half of southeast q'r, & east half of northeast q'r & & northwest q'r of northeast q'r & southwest q'r of southeast quarter of section number twenty-seven, in township number nineteen north, of range number three east of the third principal meridian, containing two hundred & eighty acres and , and that said land, at the time of said purchase, was within the district of land formerly subject to sale at the land-office at Danville, Ills., (now Springfield, Illinois,) and rendered subject to sale by law; all of which appears of record in my office.

Given under my hand the day and year first above-written.

JOHN CONNELLY, SEN.,
Register of the United States Land Office, at Springfield.

UNITED STATES LAND OFFICE, SPRINGFIELD, ILLINOIS,
Register's Office, October 8th, 1856.

I, John Connelly, s'r, register of the land office, at Springfield, Illinois, do hereby certify that, on the fifteenth day of November, in the year A. D. 1855, Clifton H. Moore purchased of the General Government, at the land formerly at Danville, Ills., (now at
72 Springfield, Illinois,) the west half of the northwest and west half of the southwest quarter of section number twenty-seven, in township number nineteen north, of range number three east of the third principal meridian, containing one hundred and sixty acres and , and that said land, at the time of said purchase, was within the district of land formerly subject to sale at the land office at Danville, Ills., but now Springfield, Ills., and rendered subject to sale by law, all of which appears of record in my office.

Given under my hand the day and year first above written.

JOHN CONNELLY SEN.,
Register of the United States Land Office, at Springfield, Illinois.

Also, a copy of the records in a certain suit in the United States court, at Springfield, Illinois. (See agreement, pages 73 & 74.)

Also, the marshal's deed to T. R. Butler, and a deed from Butler to David Davis, all for the S. E. S. W. 27, T. 19, R. 3 E. (See agreement, page 74.)

And then called J. P. MITCHELL, who testified:

"I am the J. P. Mitchell who entered the S. ½ S. E., & the S. E. S. W. sec. 27, T. 19, R. 3 E., entered it the Danville, Ills., land office, in 1855—about Nov., 1855. The lands were put up at public sale by the land officers. I bid off the above at a cent or two per acre more than 2.50 per acre, paid my bid & got my certificate of entry.

C. H. Moore, at the same time and place, bid off at the same sale, the S. W. of S. W. ¼ of sect. 27, T. 19, R. 3 E., paying a cent or two per acre more than 2.50 per acre for his tract. At the time of the sale
73 at Danville, when Moore & myself came back from Danville to Clinton, Illinois, we then heard from some source that Thomas J. Bunn had claimed or taken a pre-emption on a part of the land in sec. 27, 19, 3 E., & we had entered. And in one or two weeks C. H. Moore, John Warner & myself went out & went all over said section; there was at that time no improvements on any part said land claimed by Bunn. We did find two peices of old scantlin, three or 4 feet long, and an old piece of board about 6 or 8 feet long, laying together upon the ground on the S. W. S. W. This made no show & could not have been used in any building to be put upon said land. No one then lived on the land or any part of it, or within two miles of it. Saw the lands several times, in the winter of 1855 & '6; no improvements were put upon it until about Dec. 1, 1856, when a small board shanty about 12 feet square was put upon the S. W. S. W.; never saw anybody in it, & don't know, of my own knowledge, who built the shanty. The shanty remained there a year or so, & then it disappeared. No other building was ever put up on the land, and it is now raw prairie; have sent my certificate of entry of this land to the land office for a patent. They hold my certificate yet, but I have never taken back my purchase-money for this land. I never knew of Thomas J. Bunn living on this land. He could not have lived there long without my knowing it. I am the defendant in the record introduced here from the U. S. court, at Springfield, Illinois. Then I paid all the taxes on this tract until sold by T. R. Butler.

C. H. MOORE called and sworn:

I entered the S. W. S. W. 27, 19, 3, at a public sale of lands, made by the land officers in Danville, about Nov. 15th, '55. It was put up
74 at auction. I bid one or two cents per acre over 2.50 per acre. It was struck off to me, & I paid for it in money & land warrants, or all money. Mitchell, either just before or just afterwards, bid off the S. E. S. W., at about the same price. I was close to him when he made the bid. Had no notice of any pre-emption claim then upon the land. Did not hear of any such claim until we came back to Clinton. Did then hear from some source, not now remembered, that some person in Bloomington, Ills., had or intended to pre-empt a part of 27, T. 19, R. 3, and in from ten to twenty days after we entered the land at Danville. John P. Mitchell, John Warner & myself went out & examined the land carefully—particularly S. ½ S. E. & S. ½ S. W. ¼ 27, 19, 3. We were at the N. W., S. W., & S. E. corners of that section. There was no improvements or timber, or material for improvements on this 160 claimed by

Bunn, except the three little pieces of lumber named by Mitchell. The next fall or winter after I had entered the S. W. S. W., there was a little shanty on the land; never saw Bunn or any other person living in it. This shanty remained there a year or two, & then it disappeared. After I had entered the land it was assessed to me, and I have paid all taxes assessed upon it since. Think it was sold for taxes, but I bid it off, & paid it in that way.

GEORGE D. SMALLWOOD called & sworn:

Am a surveyor; live in sec. 16, T. 19, R. 3, about 3 miles from this land in 1855; was about the nearest resident to it in 1855. There was no one living on this land in 1855 to my knowledge. In the fall or winter of 1856, think it was in the fall of '56, that I saw a little shanty had been erected on it. Never saw anybody living in it. Know Thomas J. Bunn,
75 of Bloomington. He was at my house once or twice in 1855 or '56. He could not have lived there long in either '55 or '56 without my knowing it.

The deposition of Thomas J. Bunn & wife was then read by defendant Moore, as follows:

Deposition of Mary E. Bunn taken May 3rd, 1867.

Int. 1. What is your name, age and residence?

A. Mary E. Bunn, wife of Tho's J. Bunn; age, 30 years; residence, Bloomington, Illinois.

Int. 2. Do you know the parties to this suit; if so, which ones, & how long have you known them?

A. I do not know any of the parties, except my husband; have seen Mr. C. H. Moore.

Int. 3. If at any time you lived in De Witt County, state when it was & how long you lived in the county.

A. We did live in De Witt County; it was nearly twelve years ago. We came here twelve years ago this spring, and it was the next summer or fall that we lived in De Witt County. I think it was in Sept., but am not positive. It was just cold enough to have a fire. I think we staid there a week, as well as I remember.

76 Int. 4. In what house did you live during this time?

It was a shanty of one room on some land that my husband had pre-empted; do not know the numbers of the land.

Int. 5. How many nights did you remain at this house, & how many did you stay at Smallwood's?

A. Did not stay at Smallwood's at all. The night we went down we staid at Winslow's, as well as I remember. We stayed all the other nights in this shanty.

Int. 6th. How long were you gone from Bloomington, & what proportion of your household & kitchen furniture did you take down to this house with you?

A. We were gone eight or nine days, I should think; am not positive as to number of days. We took down a bed & bedding, stove & kitchen furniture, two chairs, a table, & dishes. We were boarding at the time we went down, & so had no household & kitchen furniture, except what we purchased to take down.

Int. 7. When you went down, did you expect to remain any length of time?

A. I did not know how long we were to remain. There was no time set when we were to come back.

MARY E. BUNN.

77 *Deposition of Thomas J. Bunn, taken May 3d, 1867.*

Int. 1. What is your name, age, residence, & occupation?

A. Thomas J. Bunn; age, thirty-four years; residence, Bloomington, Illinois; am postmaster.

Int. 2. Do you know the parties to this suit; if so, which one, and how long have you known them?

A. I am one of the defendants; have known Mr. Robbins about six or seven years, & Mr. Moore 20 or 30 years.

Int. 3. If you have ever lived in De Witt County, state how long, & on what land you resided.

A. I lived in De Witt County about twelve years ago. I think it was on sec. 27, town 19, range 3. I think we went out there from Winslow's Monday afternoon, and came back the next Monday afternoon. Our household stuff that we took down there we did not get back under about a month.

Int. 4. Did you reside there as long as you intended when you left Bloomington?

A. No; I think my wife was sick. That was the reason we came off when we did.

78 Int. 5. When you left Bloomington, did you intend to make this land your permanent home?

A. It was not the intention to remain there permanently that fall or spring that we went there, because we did not have suitable accommodations. After that it depended entirely upon circumstances. My present impression is that I would not reside there permanently for four or five such pieces of land.

Int. 6. Did you ever make any effort to go back and live on the land?

A. No; not to go back & live on it. We attempted to cultivate it two years, or to have it cultivated. We did not cultivate it personally.

Int. 7. Did you ever gather a crop from it, or have it done?

A. I think a part of the wheat crop that was grown on it one year was gathered by Mr. Spencer.

Int. 8. Can you give the date of your residence there?

A. My impression is it was in September, & in this I am a good deal guided by what my wife says. I am not sure whether it was in 1854 or '5; I should think 1855.

79 Int. 9. Was it the year after you filed your pre-emption claim?

A. If I filed the pre-emption claim in the winter, which is my impression, then it was the next fall that I went there.

THOMAS J. BUNN.

This was all the evidence given in said cause.

JOHN M. SCOTT, *Judge.* [SEAL.]

Copy of agreement.

In circuit court of De Witt County, Ill's.

RUFUS W. ROBBINS
vs.
THO'S J. BUNN ET AL.

Abstract of the record from Springfield to be incorporated into the certificate of the evidence instead of the record itself, as follows:

A record duly certified from the United States circuit court for the

southern district of Illinois, showing that, on the 11th day of June, A. D. 1859, Horatio M. Avery, Theron R. Butler, and John R. Cecil, partners doing business under the name, firm, & style of Avery, Butler & Cecil, recovered a judgment in said court against John P. Mitchell & Joel E. King, partners doing business under the name & style of Mitchell & King, for the sum of $2,030.09; and that afterwards, to wit, on the 22d day of July, 1859, an execution was issued on said judgment, but not taken from the clerk's office. And that afterwards, to wit,
80 on the 13th day of January, 1860, an alias execution was issued out of said court on said judgment, and came into the hands of the marshal on the same day. On the 27th day of January, A. D. 1860, was levied, among other lands, on the E. ½ W. ½, sec. 27, town 19 N., R. 3 E. 3d p. m., and, after being advertised, was sold by the marshal on the 29th day of March, 1860, to C. H. Moore, pl'ff's att'y, and a certificate of purchase was issued by the marshal to him, which was afterwards assigned by him to Theron R. Butler, one of the plaintiffs, (all the other lands sold having been redeemed.) And, afterwards, on his petition, the said court, on the 6th day of May, 1865, ordered D. L. Phillips, the then marshal, to make a deed to said land on said sale to said Butler.

Deed from D. L. Phillips, marshal, to Theron R. Butler to said land, dated January 6th, 1865, for E. ½ S. W. S. E. ½ N. W. 27, T. 19, R. 3 E., and recorded in book U of deeds, page 450, January 31st, 1865.

Quit-claim deed from said Theron R. Butler to David Davis for said
1 and, dated January 9th, 1867, and recorded in book X of deeds, page 477, March 29th, 1867, for the E. ½ S. W. & E. ½ N. W. ¼ 27, T. 19, R. 3 E.

Patent from the United States to Clifton H. Moore for W. ½ S. W. 27, T. 19, R. 3 E., dated February 1st, 1859.

By agreement, both parties have the right to appeal without
81 bond, and may use the same record, and the above synopsis is to be inserted in the record, instead of the record from the United States, and the patent to Moore, and the marshal's deed to Butler, and Butler's deed to Davis.

WILLIAMS & BURR,
For Robbins.
DAVID DAVIS,
By C. H. MOORE,
His Solicitor,
& C. H. MOORE, *Pro Se.*

I hereby certify that the above abstract is to be inserted into the record in place of the record, deeds, & patent above-named after the descriptions of the lands & dates are filled in.

Dated this 20th day of December, A. D. 1869.

JOHN M. SCOTT, *Judge.* [SEAL.]

STATE OF ILLINOIS,
De Witt County, ss:

I, W'm L. Chambers, clerk of the circuit court within and for the county of De Witt, in the State aforesaid, do hereby certify that the above and foregoing is a complete copy of the records and files pertaining to a certain cause lately pending in said court, on the chancery side thereof, wherein Rufus W. Robbins was complainant, and Thomas J. Bunn et al. were defendants, as appears to me from the records and files of my said office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Clinton, this 29th day of December, A. D. 1869.

82 [SEAL.] W'M L. CHAMBERS, *Clerk.*
By W. H. HARRISON, *Dep'ty.*

And upon which transcript of record filed in said supreme court as aforesaid, appear the following assignments of errors and the joinders therein.

83 State of Illinois supreme court, 2nd grand division, January term, 1870.

RUFUS W. ROBBINS
vs.
THOMAS J. BUNN, MARY E. BUNN, CLIFTON H. MOORE, and DAVID DAVIS. } Appeal from De Witt.

Assignment of errors.

Appellant assigns the following errors in this record:
The court erred to the prejudice of appellant:
First. In dismissing the bill as to the land patented to Moore.
Second. In not decreeing that Moore convey to Bunn the legal title vested in him (Moore) by the patent.
Third. In not decreeing the land patented to Moore to be subject to the mortgage.
Fourth. In not setting aside the deed from the marshal to Butler, and from Butler to Davis.
For the above errors and others that will be apparent on an inspection of the record, the decree should be reversed and modified, or the cause remanded, with instructions to the court below.

WILLIAMS & BURR,
Counsel for Appellant.

The decree should not reversed on account of any of the above errors.

C. H. MOORE.

84 Appellees come and assign the following cross-errors in this record:

1. The court erred to the injury of appellee Davis in ordering that the land conveyed to Davis was subject to the mortgage.
2. In setting aside the deeds made by the marshal to Butler, & by Butler to Davis.
3. In setting aside Mitchell's entry of the land at the land office, at Danville, Ills.
4. In deciding that Bunn's pre-emption was the supreme title.
5. In deciding that Robbins had any right to contest any title to the land in said morgage mentioned.
6. In not dismissing complainant's bill as to respondents Davis & Moore.

C. H. MOORE,
Sol. for David Davis & himself.

The decree should not be reversed by reason of any of the above assigned errors, but should be reversed for the errors assigned by Robbins.

WILLIAMS & BURR,
For Robbins.

85 And on the 17th day of January, A. D. 1870, being the last day of said January term, A. D. 1870, being one of the days of said January term, A. D. 1870, of said supreme court, an order was entered of record in said court, in said cause, as follows:

RUFUS W. ROBBINS
vs.
THOMAS J. BUNN ET AL. } Appeal from De Witt.

On this day come the said parties, by Mr. Williams, attorney, and said cause is submitted for both sides on abstracts and briefs to be filed, as per stipulation, and the court not being sufficiently advised, take time to consider hereof.

86 And on the 4th day of February, A. D. 1870, being the last day of said January term, A. D. 1870, of said supreme court, the following final order was entered of record in said court, in said cause, to wit:

RUFUS W. ROBBINS
v.
THOMAS J. BUNN, MARY E. BUNN, CLIFTON H. Moore, and David Davis. } Appeal from De Witt.

On this day come again the said parties, and the court having diligently examined and inspected, as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of opinion that, in the record and proceedings aforesaid, and in the rendition of the decree aforesaid, there is manifest error: Therefore, it is considered by the court that, for that error, and others in the record and proceedings aforesaid, the decree of the circuit court in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed; and that this cause be remanded to the circuit court for such other and further proceedings as to law and justice shall appertain. And it is
87 further considered by the court that the said appellant recover of and from the said appellees costs by him in this behalf expended, and that he have execution therefor.

88 And at a supreme court begun and held for the central grand division of the State of Illinois, at Springfield, on the first Tuesday after the first Monday in January, A. D. 1871—present, Charles B. Lawrence, chief justice; Pinkney H. Walker, justice; Sidney Breese, justice; William K. McAllister, justice; John M. Scott, justice; Anthony Thornton, justice; Benjamin R. Sheldon, justice—to wit, on the 3d day of January, A. D. 1871, being the first day of said term of said court, there was entered of record in said court a motion, in the words and figures following:

Petition for rehearing.

RUFUS W. ROBBINS
v.
THOMAS J. BUNN ET AL } Appeal from DeWitt.

On this day come said appellees, by Mr. Moore, their attorney,
89 and move the court for a rehearing of this cause, and the court, not being sufficiently advised, take time to consider hereof.

And, on the 21st day of January, A. D. 1871, being one of the days of said January term, A. D. 1871, of said court, the following order was entered of record in said court, to wit:

RUFUS W. BOBBINS
v.
THOMAS J. BUNN ET AL. } Appeal from DeWitt. Petition for rehearing.

The court having considered the motion for a rehearing entered herein, it is ordered that the same be granted on the points named by the court; and the counsel for the appellees are allowed six days within which to file argument, and the appellant is allowed six days thereafter within which to reply.

And, on the 7th day of February, A. D. 1871, being the last day of said January term, A. D. 1871, of said court, the following final order was entered of record in said court, in said cause, to wit:

90 RUFUS W. ROBBINS
v.
THOMAS J. BUNN, MARY E. BUNN, CLIFTON H. MOORE, and DAVID DAVIS. } Appeal from DeWitt. Petition for rehearing.

On this day come again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of opinion that, in the record and proceedings aforesaid, and in the rendition of the decree aforesaid, there is manifest error: Therefore, it is considered by the court that, for that error, and others in the record and proceedings aforesaid, the decree of the circuit court in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed; and that this cause be remanded to the circuit court for such other and further proceedings as to law and justice shall appertain.

And it is further considered by the court that the said appellant recover of and from the said appellees costs by him in this behalf expended, and that he have execution therefor.

91 STATE OF ILLINOIS,
Supreme Court, Central Grand Division, ss:

I, William A. Turney, clerk of said supreme court, hereby certify the foregoing to be a true and complete record of a cause which was tried before said court at January term, A. D. 1870, and on rehearing, at January term, A. D. 1871, on an appeal from the circuit court of DeWitt County, wherein Rufus W. Robbins was appellant and Thomas J. Bunn, Mary E. Bunn, Clifton H. Moore, and David Davis were appellees, as the same appears from the record and files of my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Springfield, this 10th day of July, A. D. 1871.

[SEAL.]

WM A. TURNEY,
Clerk Supreme Court.

92 I certify that the foregoing record involves the construction of an act of Congress, and is adverse to a right claimed thereunder.

C. B. LAWRENCE,
Chief Justice Supreme Court of Ills.

OTTAWA, ILLS., *Sept.* 26, 1871.

(Indorsement on cover:) No. 470. David Davis & Clifton H. Moore, plaintiffs in error, vs. Rufus W. Robbins. Illinois sup. court. Filed 4th December, 1871.

Argument of Appellant.

Supreme Court of United States

No 470.

CLIFTON H. MOORE AND DAVID DAVIS,
PLAINTIFFS IN ERROR,
vs.
RUFUS W. ROBBINS.

In Error to the Supreme Court of the State of Illinois.

CLIFTON H. MOORE AND DAVID DAVIS
vs.
RUFUS W. ROBBINS.

In Error to the Supreme Court of the State of Illinois.

The facts upon which this cause is founded are as follows:

At a public sale of government land, made at Danville, Ill., Nov. 15, 1855, C. H. Moore purchased, for money, at $2 52 per acre, the southwest quarter of the southwest quarter of section 27, town 19, range 3 east of 3d P. M.; and on the same day, and at the same place, John P. Mitchell purchased the southeast quarter of the southwest quarter, and the south half of the southeast quarter of the same section, paying therefor, in cash, a few cents per acre over $2.50. Moore and Mitchell being the highest bidders, the land above was struck off to them. No improvements were then upon the land, and no notice of a pre-emption claim was filed in the Land Office beforeor at the time of the sale. Certificates of entry and payment were given to Moore and Mitchell by the Receiver of said Land Office, upon which Moore procured a patent. No patent has been issued to Mitchell, nor has his purchase money been returned. Davis holds under Mitchell, by intermediate conveyances, as to the southeast quarter of the southwest quarter, section 27, town 19, range 3 east.

The defendant in error claims under the following facts: Thomas J. Bunn, of McLean county, Ill., makes out a declaratory statement in which he says he commenced improving upon said land on the 8th of Nov., 1855—see printed record, page 27. No evidence when it was filed in the Land Office at Danville, Ill. On the 20th day of Feb., 1856, Bunn files the usual affidavit of himself alone, and is permitted to enter all the above tracts as a pre-emption under the act of Sept. 4, 1841, and on the 22d of February, A. D. 1856, only two days after he entered the land at Danville, Ill., he mortgages the same land to Lewis Bunn for $1,000, due in three years at six per cent. interest. This mortgage and note was assigned to the defendant in error, who commenced this suit to foreclose his mortgage, making Davis and Moore parties.

The first error assigned by the plaintiffs in this case is as follows: "The Court below erred to the injury of the plaintiffs in deciding that the sale of the southwest quarter of the southwest quarter of section 27, town 19, range 3 east, made by the United States Land Officers at the Land Office at Danville, Ill., at a public sale on the 15th of Nov., 1855, to C. H. Moore, the highest bidder, for cash, was null and void." There is no question made in this record about the above tract being government land at the time of Moore's entry. There was no notice filed in the Land Office to notify, either the officers of the government, or the successful bidder, before, or at the time of the sale, that the land had been pre-empted. It is true that the record shows a declaratory statement (page 66 of record, 27 of the printed copy) dated Nov. 8, 1855, but there is no file mark or proof that it was on file in the office of the Register of the Land Office at the time he offered the land at public sale. There was no improvement on the land to constitute actual notice. The presumption is that a land officer does his duty, and the fact that such officer put up the tract at public sale to the highest bidder, for cash, received the money for it, when taken in connection with the fact that there is no proof of the time when Bunn's declaratory statement was filed, is proof conclusive, we think, that there was no such notice on file in the Land Office when the sale was made. It is true the notice is dated Nov. 8, 1855, and attested by E. J. Ives, who is not either the Register or Receiver of the Land Office; but there is not a particle of proof showing that it was ever filed in the Land Office. The time of filing this statement must be before the sale commenced.—see sec. 14 of act Sept. 4, 1841. If this proof was not made before the day appointed for the commencement of the sale, the claimant of the pre-emption could not avail himself of the benefit of the act; in other words, if the pre-emption claimant did not make his proof before the day of sale, to him there was no pre-emption law, he was excluded from its benefits by the express terms of the law itself The reason for this is obvious to the Court. Were the law otherwise, pre-emptors could hinder, delay and defeat public sales of land. Purchasers would not buy and pay their money to the government, and take the risk of having a pre-emption claim filed after their bid, and have their title defeated. The case at bar fully illustrates the reason for the law. In order to show the Court that we are correct in this position, we refer to Lester's Land Laws,

volume 1, pages 362 and 382, Letter No. 421; by the instructions of the Commissioner of the United States Land Office, same book, page 362, these declaratory statements are to be numbered in the order of their reception, and a book is to be kept, showing the date of their reception, name of party, &c, &c, and the township plats are to be marked with a a red cross on the tract claimed, also noted in pencil on the tract books—see Lester's Land Laws, page 363. This marking was to be done, we say, to notify all persons that the tract was pre-empted and could not be entered. Every person who enters land is presumed to examine either the plats, or the tract books, in the Land Office, mostly the plats. Then they could see the red cross and sign of danger. Nothing of this kind was done upon the plats or tract books, and there is not a particle of proof to show it. It was not done, or the Land Officers would not have put up the land at public sale and sold it, taking the purchaser's money therefor. And if it had been done, Robbins' solicitors would have proven it. If there was no declaratory statement filed when the land was sold, and this is an affirmatory fact that those claiming under the pre emption must prove, then the sale to Moore was lawful and right and should be sustained. The object of the government in having land offices was to sell their lands, and a purchaser for money without notice is protected in sales made by the government from any equities or illegal titles, just as much as if the sale was made by one individual to another. Bunn did not commence his improvement until long after the entry by Moore—see record, page 52, printed copy page 23. Winslow says he commenced Nov. 29, 1855, but we say he is mistaken and contradicted by Bunn himself—see record, page 79, printed copy, page 33; J. P. Mitchell, record, page 73, printed copy, page 31; C H. Moore, record, page 74, printed copy, page 32; and by G. D. Smallwood, record, pages 63 and 75, printed copy, pages 26 and 32. Shanty was put up in fall of 1856. The proof shows that Bunn did not have any improvements on the land when entered by Moore. None on it when he entered it himself, Feb. 20, 1866. All this time Thomas J. Bunn resided in Bloomington, thirty miles from this land, except the eight days he was making the improvements and living upon this land, when he left it with no intention of returning to it—see record, page 77, printed copy, page 33. Left Winslows' in Clinton, one Monday, went on the land, left it the next Monday, only seven days; not his intention to

stay on the land permanently when he went on it with his family—see record, page 78, printed copy, page 33. Neither Mitchell nor Moore heard of the pre-emption until after they had entered the land—see record, page 74, printed copy, page 31 for Moore's statement, and page 73, printed copy, page 31, for Mitchell's statement—Washburn on Real Property, vol. 3, page 172, sec. 24, also sec. 30.

The second error assigned is: The Court below erred in deciding that the sale of the southeast quarter of the southwest quarter of section 27, town 19, range 3 east of 3d P. M., made by the United States Land Officers, at the Land Office in Danville, at a public sale on the 15th of Nov. 1855, to John P. Mitchell, the highest bidder therefor, for cash, was null and void." All that we have said in regard to the first error applies to this. The object and intention of the government in having land offices was to sell its land, to part with its title, receive pay for the same, and whoever offered to pay that price first, in accordance with the forms of law, was the purchaser. The patent dated back to the entry. Jackson v. Wilcox, 1st Scammon, 344. Cavender v. Smith, 8th Iowa, 360. 3d Washburn on Real Property, page 175, sec. 35. The object of the pre-emption laws was to give to the bona-fide settler upon the public domain the right to buy his land and pay for it in one year after settlement, virtually taking the land out of the market for one year. To do this, the pre-emptor must do two things before the day of sale, if the land was sold for cash. First, commence a bona-fide improvement, *i. e.* put on the land to be pre-empted so much of a permanent improvement as would be actual notice to any person examining the tract of land, of an intention to permanently reside on the same. Second, the pre-emptor must have on file his declaratory statement of such settlement and intention, so that the officer can mark the plat and tract book, and not sell the land on the day of sale of such tract for money, see act of Congress, March 3d, 1853. Must be filed before the land is offered at auction. Mitchell had no actual notice, because nothing was done on the land in the shape of improvements until Nov 29, 1855—see Winslow's testimony, record, page 52, printed copy, page 23. Mr. Bunn, himself, does not pretend that he did anything on the land as early as this; says, if he filed his pre-emption in the winter, as he thinks it was, it was the next fall—see record, page 79, printed copy, page 33. There is no pretence that Bunn

deposited or left on this land the two short pieces of scantling and old board seen on the land by Mitchell and Moore a week or two after they had entered the land—see record, pages 73 and 74, printed copy, pages 31 and 32. See sec. 10, act of Sept. 4, 1841. Mitchell had no constructive notice of the pre-emption at the time he purchased this tract of the Land Officers, because the notice was not filed by Bunn, so that the plats and tract books were not marked with the red cross. The record shows no proof of Bunn's complying with sec. 15 of the act of Sept. 4, 1841. There was no actual or constructive notice to Mitchell, or the Land Officers, of Bunn's pre-emption at the time this tract was put up at public sale and bid off by Mitchell, and paid for in cash, and not warrants. The presumption, then, was that when the United States owned land that was surveyed and platted, that it was for sale to the first applicant; that the Land Officers did their duty in selling this land, and Mr. Bunn must show, by affirmative proof, that he had performed in good faith, before the sale to Mitchell and Moore, all the acts required by law to defeat the sale to Mitchell and Moore, give him the right to keep said tracts out of market, and the United States out of the purchase money for twelve months. In this, we insist, he has failed. Lytle et. al. v. State of Arkansas, 9 How. 333. See Commissioners' instructions to Registers and Receivers, Sept 15, 1841. Lester's Land Laws, vol. 1, pages 361-2. A private entry, made the same day the pre-emptor made his improvement, is a bar to the pre-emptor's claim. See Secretary Ewing's decision, March 26, 1850. Lester's Land Laws, vol. 1, page 382, No. 421. Mitchell and Moore purchased these tracts of land fourteen days before Bunn commenced his improvement, Nov. 15, 1855, Nov. 29, 1855. The United States, by the sale to Mitchell and Moore, for cash, parted with its title, and had no right to resell or permit a pre-emption to be filed on the land after the sale. 3d vol. Washburn on Real Property, 3d ed, page 172, sec. 24.

"The Court below erred in deciding that appellant Moore's title, by patent from the United States, to the southwest quarter of the southwest quarter of section 27, town 19, range 3 east of 3d P. M. was null and void." Moore was guilty of no fraud, nor were the Land Officers, in selling the land; Moore paid a valuable consideration for it without notice, and should be protected. Moore has a patent from the United States, the best title, and emanat-

land, made at auction, by the Land Officers, he must comply with the law of Sept. 4, 1841, and March 3, 1853, 1853. We say he has done neither.

The Court below erred in deciding that Thomas J. Bunn, in obtaining his pre-emption to the south half of the southwest quarter and the south half of the southeast quarter of section 27, town 19, range 3 east, had honestly complied with the law in regard to pre-emptors, passed Sept. 4, 1841, and March 3, 1853. Referring the Court to what we have already said in regard to there being no proof when the declaratory statement was filed or delivered to the Land Officers. Had it been filed before the sale it would have been proven, and to the fact that the Land Officers did put up said land at public sale, and sold the land, received the consideration at a time after said declaratory statement should have been filed, facts showing that Bunn did not comply with the law in giving notice, &c. We say Bunn did not comply, did not intend to comply with the law in regard to pre-emptions, in making his improvements, and in residing upon the land. First, there is no evidence that he made any improvement upon the land until Nov. 29, 1855, fourteen days after the tracts had all been entered by Mitchell and Moore, and only Winslow swears to this—see record, page 52, printed copy, page 23, and he is fully and flatly contradicted by Mitchell—see record, page 73, printed copy, page 31; by Moore—see record, page 74, printed copy, page 32, and by Bunn himself—see record, page 79, printed copy, page 33. Bunn says: "My impression is it was in September, and in this I am a good deal guided by what my wife says. I am not sure whether it was in 1854 or in 1855, I should think 1855. If I filed the pre-emption claim in the winter, which is my impression, then it was the next fall that I went there." Bunn did file his pre-emption and affidavit Feb. 20, 1856. Winslow says he went with Bunn to Danville Dec. 11, 1855, this, by his own statement, makes his settlement and residence in the fall of 1856. But, we say, the proof shows that Bunn did not settle or improve said tracts of land within the spirit and meaning of the 15th section; did not inhabit and improve the tracts within the spirit and meaning of sec. 10 of the act of Sept. 4, 1841; did not file his proof before the land was offered at auction, act of March 3, 1853. The words inhabit and improve, in sec. 10, are synonymous with the words settle and improve in the 15th section, and means much more than being on

the land for one week, then leaving it with no intention of returning to it. We quote his answer to question 5. "It was not the intention to remain there permanently that fall or spring that we went there, because we did not have suitable accommodations. After that, it depended upon circumstances; my present impression is, that I would not reside there permanently for four or five such pieces of land." The plaintiffs in error are not amongst those who wish to "drive off" or "enter out" any bona fide pre-emptor, even if he has not complied with the letter of the law, but they are amongst those who do not propose to abandon a valid entry of land because some other person, by swearing that it is his pre-emption, wants to obtain the tract, at a less price, without inhabiting, without cultivating, without adding to the value of this and other tracts by making it his home. They do propose that the facts, the affidavit and proof, shall be passed upon by the highest tribunal known to the law. To do otherwise, would be to offer a reward to men whose consciences are "seared as with a hot iron." As to the meaning of the words inhabit, settle and improve—see Lester's Land Laws, vol. 1, page 381, 421, No. 480 and No. 481. Lester's Land Laws, vol. 1, pages 412, 413.

The fifth and sixth errors we will consider together. The point is made directly, in the record, that Thomas J. Bunn's mortgage to Lewis Bunn was void. Bunn entered this land Feb 20, 1856, and on Feb. 22, 1856, he executed the mortgage sought to be foreclosed—see record, page 14, printed copy, page 5; no patent had been issued to Bunn—see record, page 47, printed copy, page 21. By the last clause of sec. 12, act of Sept. 4, 1841, we think the mortgage made by Thomas J. Bunn void. The words of the clause are, "and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void." Under the decision of this Court in the case of Johnson et. al. v. Towsley, No. 14, Dec. term, 1871, this must be put in issue by the pleading; we think it is done fully. By the allegation in the bill—see record, page 17, printed copy, pages 6 and 7,—"Moore claims the land by some pretended purchase from the United States and avers that the land was the property of the said Bunn, and that he had full right to sell and convey the same by his deed of mortgage." Moore, by his answer—see record, page 23, printed copy, page 10 denies that said Bunn, at the time he executed said mortgage, owned the land therein described,

or had full right to sell and convey the same." Davis, in his answer, denies each and every allegation in said bill—see record, page 34, printed copy, page 15—denies that Bunn ever entered the land, and obtained a patent. It is also made in the assignment of errors and cross errors in the Court below—see record, pages 83 and 84, printed copy, pages 35 and 36. The statutory provision in sec. 12, declaring that all assignments and transfers prior to the issuing of the patent shall be null and void, applies, we say, to all pre-emptions until the patent is issued, immaterial whether they are honestly or fraudulently obtained. The inhibition in sec. 13, we admit, is different That clause, when the pre-emption and patent is obtained by false swearing in regard to said right, or the sale of the same, forfeits both land and money, and all grants are void unless made to a bona fide purchaser for a valuable consideration. The first is a wise limitation put upon the right of the pre-emptor to convey his pre-empted land until the patent is issued, a limitation and condition attached to the grant or right of pre-emption. The latter is a penalty for perjury in obtaining the pre-emption, just as effective after the patent has been issued as before, as to every one except a bona fide purchaser for a valuable consideration. The latter does not repeal the former, and it is the duty of the Court to enforce both sections unless clearly repugnant to each other.

The seventh and eighth errors we will also consider together. The Court erred in permitting the defendant in error, Robbins, to attack appellants' title, and in deciding that appellants, Davis and Moore, held the title in trust for Robbins. This decision was based, undoubtedly, upon the action of the Land Officers in regard to Bunn's title. In the case at bar, the law does not permit any of the land officers to be the sole tribunal. The section under which this *res adjudicata* is claimed is sec. 11 of the act of Sept. 4, 1841, and sec. 10 of the act of June 12, 1843, upon a careful reading of which the Court will perceive that their jurisdiction is limited to where two or more persons shall have settled on the same quarter section of land, &c. All questions as to the right of pre-emption arising between different settlers shall be settled by the Register and Receiver of the district, &c. Not one word is said about letting the land officers decide as between an entry with money and a pre-emption entry. That is fortunately left for

Courts to decide. This section does create a special and limited tribunal, limited by the act itself, to questions between settlers and no others Their authority is to be construed strictly, not extended to cases or facts not within the letter and spirit of the act. The leading case in this Court upon this question is that of Johnson et. al. v. Towsley, No. 14 of the December term 1871. The Court, Justice Miller delivering the opinion, says: "In dealing with the public domain, under the system of laws enacted by Congress for its management and sale, that tribunal decides upon private rights of great value, and may often from the nature of its functions. This is by a proceeding essentially exparte and peculiarly liable to the influence of frauds, false swearing and mistakes. These are among the most ancient and well established grounds of the special jurisdiction of courts of equity just referred to, and the necessity and value of that jurisdiction is nowhere better exemplified than in its application to cases arising in the Land Offices." Also see Little v. Arkansas, 22 How., 192. Garland v. Wynn, 20 How., 8. Lindsay v. Haines, 2 Blackstone, 559. Batchelder v. Numsala, 1 Wallace, 109. Silver v. Ladd, 7 Wallace, 219. This Court decided, in the case of Johnson et. al. v. Towsley, above cited, that the decisions of the land officers were not final, not binding upon Courts of Equity as between settlers, much less can their decision be binding between a person entering the land and paying for the same with money, and a pre-emption claimant, and we submit this question to the Court, that Robbins, being the owner of a void mortgage, under sec. 12 of the act of Sept. 4, 1841, does not stand in the place of Bunn; his place is much more slippery. His mortgage being void, "null and void"—Carr v. Allison, 5 Blackford, Ind., 63, under same clause in act of May 24, 1830—how can he come into a court of equity, and not only attack and beat off, but he acquires the legal title to the land from innocent purchasers without notice from the Land Officers themselves? In other words, the Court below permitted a fraudulent pre-emption right to be conveyed by a deed or mortgage declared by the act of Congress creating the right, to be null and void, to go into a Court of equity, and there acquire the legal title of Davis and Moore, innocent purchasers without notice under a public sale for a valuable consideration, made by the Land Officers before the settlement was made or the declaratory statement was filed. A few words in regard to the power or right of the government or its

officers after they have put up land at public sale for cash, and it has been bid off and paid for in cash by an innocent purchaser without notice, to cancel such sale, and and resell the land. Aldrich v. Aldrich, 37 Ill., 32. Baty v. Sale, 43 Ill. 351. We say that there is no power in any officer of the government to do this. Courts of equity can only do it on the ground of fraud. That the pre-emptor honestly complied with the act of Sept. 4, 1841, and in this case, with the act of March 3, 1853. By the act of Sept. 4, 1841, this tract, being within four and one-half miles of the Illinois Central railroad, could not be pre-empted. But, by the law of March 3, 1853, it could be pre-empted, provided such settlement improvement is made before, prior to the final allotment to such railroad company, &c., we only give the substance. With that proviso in the same section, we submit that, in this case, Robbins must show that Bunn's pre-emption was not only an honest one in regard to time of settlement and improvement before sale at auction; but he must also show affirmatively that the declaratory statement was filed in the Register's office before the tract was offered for sale at auction, and that the final allotment to the Illinois Central Railroad Company had not been made. No attempt is made to do this. As to the effect of a proviso in a section, we refer the Court to Boon v. Juliet, 1 Scam., 260, 261. United States v. Dickson, 15 Pet. 165. Jackson v. Chapman, 3 Cow., 390. Jackson v. Caywood, 7 Wend., 246. 1 Kent, 463. This pre-emptor must bring himself within the negative or limiting portion of the statute of March 3, 1853, by showing that he honestly made his settlement on this tract before it was offered at auction; and by the proviso, he must further show that his settlement was previous to the final allotment to such railroad, neither of which is attempted. The statute of March 3, 1853, should be so construed as to give force to every word and sentence in it, unless repugnant. The intention of Congress was to protect the purchaser, if he purchased the land at auction, no notice being filed; and to protect the government, and allow it to receive the enhanced value of the alternate sections reserved, if the settlement and improvement was not made before the final allotment. The writer of this argument paid the general government as high as $4.25 per acre, cash, for other tracts of land at this same sale. Mr. Bunn took no steps to make his pre-emption an honest one in settling and improving it under the act of Sept. 4, 1841, nor did he make it in time under the act of March

3, 1853, if it had been an honest one. Bunn's equity does not reach as far back as Moore and Mitchell's legal title by at least fourteen days. Davis' right to whatever title Mitchell obtained is not disputed. A regular chain of title from Mitchell to Davis was shown—see record, pages 79, 80 and 81, printed copy, pages 33 and 34.

It is but justice to the Court below to say that they followed the decision of the Land Officers made in this particular case, regarding it as *res adjudicata,* and that they had no right to review that decision—see Robbins v. Bunn et. al., 54 Ill., 49. We failed to convince them that, by the act of Congress, Registers and Receivers only had the right to decide between rival pre-emptors, and not between a pre-emptor and a person who enters the land for money. But this whole question is now settled by Johnson et. al. v. Towsley, No. 14, Dec. term, 1871.

The seventh, eighth and ninth errors, while we think them very grievous ones, we have some hesitation in urging before this Court; but as this Court has acquired jurisdiction of the case, it has a right to decide all the points made in it. But we will say a few words upon each in their order. This was a bill filed by Robbins v. Bunn and wife to foreclose a mortgage given by Bunn. Davis and Moore, we say, were not proper parties to the foreclosure; they could not redeem from the sale, nor had they any interest in the fund to be raised by the sale, nor could Robbins say that the land would not be redeemed by Bunn, that he had such an equitable title until after his foreclosure and time of redemption had expired. Then he would hold Bunn's title to the land (if his mortgage was valid) subject to no clause of defeasance; then he could come and with his equitable title in a court of equity, in a direct proceeding against Davis and Moore, insist that his equitable title, by reason of facts to be alleged and proven, was prior in time and better in equity than Davis and Moore's, or Moore's legal title by patent. Davis and Moore's interest could not be affected by the foreclosure. Hilliard on Mortgages, pages 151 and 152 and cases there cited, also page 156, section 69. Wright v. Dudley, 8 Mich., 15. In this case priority of title must also exist. Moore's patent title can only be attacked in a direct proceeding for that purpose, and by a party who holds the equitable interest without any chance or chances of defeasance. Hunt v. Wickliffe, 2 Peters, 201. Hoofnagle v. Anderson, 7 Wheaton, 212. Patent cannot

be attacked but by some one whose right commenced previous to the right under which the patent was issued. Lindsay v. Miller, 6 Peters, 677. Boardman v. Reed, 6 Peters, 328. Stringer v. Young, 3 Peters, 328. Covander v. Smith, 8 Iowa, 360. Prevost v. Gratz, 6 Wheat., 481. Brill et. al. v. Stiles et. al., 18 Ill.,307 and cases there cited

To the eighth error assigned, we say, neither Davis nor Moore could hold their title in trust for Robbins. Robbins as yet has not obtained the equitable title of Bunn. A payment of the money defeats Robbins' title entirely. Robbins, in making this claim, puts his title, with all its illegalities, in issue and it is to be enquired into strictly and see if the various laws and instructions in regard to pre-emptions have been complied with honestly, with the intent to make such land the pre-emptor's home for at least one year, and he must go further and show that his settlement and residence commenced prior to the sale at auction to Moore and Mitchell by the Land Officers. Must show that he substantially did all the law required and in apt time, and that Bunn had the right to convey the title to Robbins, and then show that Moore and Mitchell knew some fact, or did some act that made their entries fraudulent. The evidence fails to show that either Moore, Mitchell, or the Land Officers knew anything about Bunn's pre-emption when this land was put up at auction and bid off by them. If this be true, how can it be said that a fraud has been committed by them, or either of them, upon the rights of Bunn or Robbins. To constitute fraud requires intention as well as acts. Moss v. Riddle, 5 Crouch, 351. McConnell v. Wilcox, 1 Scam., 344. Miller v. Howell, 1 Scam., 499. Edmonds v. Hildreth, 16 Ill., 214. Choteau v. Jones, 11 Ill., 301. Bowen v. Schuler, 41 Ill. 192. Mitchell v. Deeds, 49 Ill., 416. Even if we take the definitions of fraud as laid down by Mr. Story, vol. 1, secs. 207 and 208, we fail to see where Mitchell and Moore or the Land Officers have been guilty of fraud. This must be alleged in the bill, and it is alleged —see amended bill, record page 27, printed copy, page 11. "That the said defendant, Moore, long after the said Thomas J. Bunn had located upon the said land in the original bill described, and had acquired a right to pre-empt the same, the said Moore pretended to enter the southwest quarter of the southwest quarter of section 27, town 19, range 3 east, and the Commissioners of the General Land Office issued by mistake, to said Moore, a patent therefor.

But orator avers that the said Bunn had previously entered the same under the laws of the United States, and had paid for the same; orator further shows that at the same time Moore made his pretended entry of said forty acres, he had full notice that the said Bunn claimed the right to said land as a pre-emption, &c." Moore, in his answer to the amended bill—record, pages 31 and 32, printed copy, pages 13 and 14—denies fully all these allegations; sets up the entire defense; notifies Robbins fully that he must prove the allegations in his bill. Davis, by his answer—record, pages 34 and 35, printed copy, page 15—also denies all the allegations in the bill, and sets out his title, and that he was an innocent purchaser without notice. We think it plain that complainant, Robbins, failed to prove the allegations in his bill, failed to show that Mitchell, Moore, or the Land Officers knew anything about Bunn's pre-emption when the land was sold at public aution; no notice was filed at that time.

A word in regard to the ninth error. We admit that we were more surprised, if possible, when we found that we were not to have the taxes we had paid yearly on the land refunded, than with any other portion of the decision of the Court below. This land can be likened to a trust fund in litigation, the taxes upon the trust fund must be paid yearly and speedily, if not, the land itself would be sold in order to raise the taxes. The taxes were paid, and had to be paid in order to preserve the fund itself and were properly a charge upon the fund, let who would, obtain it in the end. If it was Robbins' or Bunn's land, and Moore and Davis had made no claim to it, they would have had to have paid this tax or lost the land. The land was raw prairie, not cultivated—see record, page 73, printed copy, page 31, No revenue was derived from it out of which to pay the taxes. Moore and Mitchell are not trustees by fraud or mistake of their own; they honestly purchased the land from officers who, for aught they knew, had the right to sell, and now insist that the sale to them was good, and because they acted under that belief for ten years, in paying the taxes. This land was entered Nov. 15, 1855. This suit was commenced April 12, 1866, and yet a court of equity refused to make Robbins pay back this tax, while it decided that Moore and Davis were trustees and held their title in trust for Robbins. If Bunn or Robbins had paid this tax, or offered to have paid it, or notified Mitchell and

Moore not to pay it, as they claimed the land, then there would have been some propriety in saying that Mitchell and Moore should loose their money paid as taxes. The land was assessed in their names, they were liable for the taxes whether trustees or not, and their personal property could be seized and sold to pay the same. Even if guilty of fraud, money that they have paid in good faith should be refunded. Estill v. Estill, 3d Bibb. 177. For these reasons we ask that the judgment of the Court below be reversed.

C. H. MOORE,
pro see.

Reply of Plaintiffs in Error.

Supreme Court of United States

No. 470.

CLIFTON H. MOORE AND DAVID DAVIS,

Plaintiffs in Error,

vs.

RUFUS W. ROBBINS.

In Error to the Supreme Court of the State of Illinois.

In the U. S. Supreme Court,

AT WASHINGTON CITY.

CLIFTON H. MOORE AND DAVID DAVIS

vs.

RUFUS W. ROBBINS.

REPLY OF PLAINTIFFS IN ERROR.

Without admitting the facts of this case to be as stated in the defendant's argument, we will pass by the same, with two exceptions, to the first point made by the defendant. We refer the court to the proof and our argument in chief as to what the facts are in regard to the pre-emption and the contest before the Register and Receiver.

The proof does not show that Bunn settled on the land in controversy on the 8th day of November, 1855, or filed his declaratory statement in the land office, before Moore and Mitchell purchased this land at public sale.

The proof does not show that Bunn entered and paid for this land regularly as a pre-emption; but on the contrary it fails to show any notice to the land officers, or to Moore and Mitchell, before or at the time the land was put up and sold at public sale; fails to show that Bunn resided on the land as required by law.

The first point made by the defence is that this court has no jurisdiction, as there is no final decree and that the appeal should be dismissed. To test the soundness of this position, it is necessary to examine the record.

Robbins filled his bill to foreclose the mortgage given by Bunn on the land in controversy, April 11, 1866—page 13, of record, 5 of copy.

Moore is made a party to this bill and bill admits, (p. 17;) that Moore pretends to own some portion of the same land by purchase from the Government of United States, but avers that Bunn had good right to sell and convey the same by his deed of mortgage.

Moore answers, Feb. 28, 1867.—record p 23,—setting up that he holds by a patent title that he purchased the sw, sw, 27, T. 19, R. 3, of the land officers at a public sale; that he has paid all the taxes on said land for at least seven years before the filing of this bill and alleges that Bunn had no right to sell this land, and that if Bunn had any title it was falsely and fraudulently obtained and of no effect as to Moore's title. Answer further alleges that Moore has paid all the taxes on said land ever since it was entered, and that no one has attempted to interfere with his rights. Robbins, April 10, 1867, files his amended bill making his allegations as to his and Moore's title more specific, and also prays that David Davis may be made a party.—record, 27, 28, 29. Davis and Moore, August 27, 1868, file their answer to the amended bill (record, pages 31 to 36) in which they deny notice to Moore or Mitchell at the time the land was purchased by them of the Land Officers at auction; denies the validity of Bunn's pre-emption (32); Davis does the same as to the southeast southwest quarter; and deny that their title is subject to the bill for foreclosure. To all of these answers a replication was filed, and the cause heard November 19, 1869, and a decree of foreclosure as to all the land in the mortgage mentioned, except Moore's sw sw forty acres, to which he had a patent.—see record, pages 40, 41, 42.

By this decree Moore gained his forty acres, and from that part of the decree Robbins appealed. By the same decree Davis lost his se sw forty acres, and he appealed (see page 42) to the Supreme Court of the State of Illinois. Robbins assigns for error, that the court below should have decreed that Moore held his title in trust for Bunn, and cancelling his patent—record, 83. Davis assigns cross errors, that the court set aside his title; that Bunn's pre-emption was the supreme title; that Robbins had no right to contest any title; that the bill should have been dismissed as to Davis—page 84. To both of these assignments of error there was a joinder in error. On final hearing before the Supreme Court of the State of Illinois, it decided that both Davis and Moore held their title in trust for Robbins, and reversed the decree of the Circuit Court as to Moore's sw sw—Robbins vs. Bunn et. al., 54 Ill., p. 53. The Court say: "The Circuit Court should have rendered a decree holding the title of all the defendants subject to complainant's mort-

gage. The decree must be reversed, the cost in this court to be taxed to Davis and Moore."

And yet we are gravely told that this decree is not a final adjudication, not a final decree in the contemplation of the acts of Congress. If the words of the statute, "That a final judgment or decree in a suit" (Story's Ed. U. S. Statutes, p. 61) means the last decree or order of court that can be made, then indeed we would have to wait until our land was sold, deed made and a decree entered confirming the sale and deed and order for possession, then, and not before, could this Court take jurisdiction. Such is not the meaning or intention of that statute—Whiting vs. Bank of U. S., 13 Peters, 15. But defendant will say, we do not carry it so far as that; we have now a decree in the Circuit Court, affirmed by the Supreme Court of Illinois, against the forty acres se sw owned by Davis, and we want a decree in the Circuit Court against Moore for his forty; then let them both, Davis and Moore, appeal to the Supreme Court of Illinois, and from that to the United States Court at Washington. This whole case has been heard by the Supreme Court of the State of Illinois, they have determined the right and titles of each party fully and finally, as fully and finally as they ever can do it, and have ordered the court below to enter a decree, holding that both Davis and Moore's title is subject to the mortgage, and it would be an insult to the Supreme Court of Illinois to say that decision was not final, and by appeal to bring the same matter before them again—Forgey vs. Conrad, 6 How., 204. The opinion in the case of Robbins vs. Bunn et. al., 54 Ills. Rep., 50 to 58, shows just what was decided, and Chief Justice Lawrence, in his certificate, (record, 92) says, "I certify that the foregoing record involves the construction of an act of Congress and is adverse to a right claimed thereunder." We think what is meant by the words in the act of Congress is, a decision of the highest court of the state upon the merits of the controversy, defining the meaning of the act of Congress and settling the rights and titles of the parties litigant under such act. This decision of the Supreme Court of Illinois is final as to Davis and Moore. Ray vs. Law, 3 Crouch, 179, is exactly in point.

What more can they do in this cause in the courts of Illinois? They can offer no proof; a decree must be entered against them. They have no standing in any of the State courts; cannot open their mouths if they have any

sense of respect for the courts and themselves; as to them the decision settles their rights, destroys their title fully and finally. We regret that we are compelled to take up so much space to expose a mere quibble, as we think; and there is no consolation in the offer held out by defendant's brief (p. 4) that more proof can be offered and we might not complain of the final decree.

The word final when used in this statute does not mean the last decree entered, or to be entered in the cause; but is used in contradistinction with the word interlocutory decree, which is a decree made by the court while the parties are yet contending and before their rights are ascertained; and the final decree is the one which settles the rights of the parties in the subject matter of the litigation. The decree as to Davis is affirmed in the Supreme Court of Illinois; if that is not final as to him, we do not understand the English language. And while the decree is reversed as to Moore's tract, the Supreme Court direct the court below to enter a decree holding Moore's title subject to the mortgage, and when defendants counsel attempt to hold out to plaintiff in error that they can further litigate their titles in the State Court, we cannot catch at such straws. We cite the following authorities: Whartons Law Dic., 389, word Final decree. Bouvier's Law Dic., 525, "Final" and cases there cited. Martin vs. Hunter, lessees, 1 Whea., 353. Montgomery vs. Hernandes, 12 Whea., 131. Whiting vs. Bank of U. S., 13 Peters, 15. Davis certainly, and we say both Davis and Moore, had the right to appeal to this court.

To the defendants second point, we say, the act of Congress never did constitute the land officers or any of them a court to determine facts between a pre-emptor on one side, and a purchaser at a public sale of land from the government for money on the other; this would be to let them decide upon their own acts. If land officers offer the public domain for sale at auction, an individual bids it off, pays his money for it, no law or decision can be found giving those land officers the right to open their mouths (only as witnesses) in a contest between the purchaser for money and a pre-emptor. A contest of this kind cannot happen if the land officers but discharge their duty. In the case at bar, if Bunn's declaratory statement had been filed before the sale at auction, then it was negligence on the part of the officers to sell it to Moore and Mitchell; they had no

right to offer the land for sale until Bunn had his year in which to enter it, and perfect his pre-emption. After Mitchell and Moore had purchased this land at public sale, paid the consideration, then the land officers had no right to let Bunn file his pre-emption claim on it—officers who permit their records to show such conduct are not the ones to decide upon the rights of the parties they have led into trouble—it is well that such conduct is left to the courts. The act of Congress, Sept. 4., 1841, Sec. 11, expressly states what the land officers may hear and decide. And all questions as to the right of pre-emption arising between different settlers shall be settled by the Register and Receiver of the district, &c. This is a court of limited jurisdiction, confined to the claims of different settlers on the same tract, who are each trying to obtain a pre-emption; each trying to show that they have settled upon and improved the land, and the court can only hear and determine the facts between such settlers. Any other adjudication would be, and is, void, and the tenacity with which the defendant's counsel urge this point surprises us. We are compelled to construe it into an admission that upon the merits of this controversy equity is with us. They do not attempt to discuss the legality of Bunn's pre-emption, or the proof of the entry of this land by Mitchell and Moore before the land officers had heard of Bunn's pre-emption; that it was not filed before the sale at auction, and that Mitchell and Moore had no notice of such claim. The only cases cited are Johnson vs. Towsly, 13 Wallace, 83, which does not apply because both parties claimed as pre-emptors, and Wilcox vs. Jackson, 13 Pet., 511. In this case the contest was whether the land was subject to pre-emption at all, and is an authority for Mitchell and Moore rather than against them. This land was entered Nov. 15, 1855, with money, and paid for the same day; it then passed entirely from the control of the land officers and they could not let a pre-emption be legally established upon it. At the time of this entry there is no proof that Bunn was on this land or had filed his notice with the land officers. The act of Aug. 2., 1852, shows what he must do, must file a notice describing the land before the tract is offered for sale. In this he failed, and yet it is urged that the pre-emption is valid, Kelly vs. Wallace, 14 Minn. 236. This pre-emption, if good at all, must comply with the law of Sept. 4, 1841, and with the law of Aug. 2, 1852, and of March 3, 1853. By the law of 1841, this tract being

within the six mile limit of the Illinois Central R. R. line, and a section alternate to sections granted to that company, could not be pre-empted; and the law of 1852 was passed to help settlers who took possesion previous to Sept. 20, 1850, and who were in actual possession of said land, Aug. 2, 1852, could pre-empt, and the law of March 3, 1853, only extended the law of 1841 over alternate sections. Defendant's counsel seem determined to ignore these distinctions. A contest between a purchaser for money, at a public sale of land, and a pre-emptor was never by law submitted to the Register and Receiver. Nor was an entry for money, at a public sale, ever set aside for a pre-emptor who had neglected to file his notice before the sale took place. The purchaser must be guilty of fraud before his title can be touched. By the law of Sept. 4, 1841, and Aug. 2, 1852, this notice must be filed before the sale. To say that the officers of the Land office, who first put up land at a public sale, and it is bid off by the purchasers, and paid for in money, can afterwards permit the same tracts to be pre-empted and not be guilty of fraud, imposition or mistake, is a little more than Western credulity can stand. View the facts as we will, they made a sad mistake in the law and in marking their own books, nor has Bunn been acting in good faith, or trying to comply with the law. He kept his title secret, let neither land officers or bidders know it at the sale. See Lester's land laws, vol. 1, p. 391, 390. When a private entry and settlement is made the same day, the entry is a bar to the pre-emption. See decision of Secretary Ewing, Lester's land laws, vol. 1 p. 382, no. 421. Pre-emptors must file notice within 30 days after they first go upon the land, Lester's land laws, 380, no. 419. No notice was ever filed.

But the defendant in error says the answers of Davis and Moore do not pretend that fraud has been committed by the land officers, but all their allegations of fraud are aimed at Bunn. The plaintiffs were taught not to speak evil of dignitaries, and they do not use that word in their answers; but we submit to the Court if their answer, taken in connection with the bill and amended bill, does not aver facts which amout to such charge. The proof shows it also. We aver and prove the facts, and let the Court find a name for such conduct. But the defendant says the record shows a full trial before the officers. The record does show a

second hearing of Bunn's pre-emption, and the Court calls the case "Bunn vs. Moore"—page 46. Bunn made his own proof and stipulation The letter of the Commissioner shows—record 46, copy 21—that the case was Bunn vs. Moore, and the effort was to set aside Moore's entry. Moore never submitted his title, his patent, to the decision of the land officers, but he did attack Bunn's title.

A word in regard to the sweeping assertion of Secretary Thompson, in his letter of June 22, 1860, "that Moore made his adverse entry at the time the records of the land office showed Bunn was a claimant for the same land." This assertion is not proven by any record, witness or paper filed in that contest, nor was it proven on the hearing of this cause, and Moore and Mitchell expressly swear they did not know it, and the fact that the land officers put up the land and sold it, shows conclusively that the records did not show that Bunn claimed this land. If that record, or any record, had shown it, the claimant under Bunn's title would have proven it. There is no such record evidence, and there is no land officer who will swear that such notice was on file in the office before such sale. There never was any proof that this declaratory statement or notice was ever filed. Will this Court infer it, in the absence of all proof and against the fact of the actual sale of the land by these same officers? Had the notice been filed, they would not have dared to violate the law by selling the land at public sale. We regret that the atmosphere of Washington City at so early a day should have had such an effect upon Secretary Thompson—Meguls vs. Ashe, 33 Cal., 74.

We can make no reply to that portion of defendant's argument on page 7, wihch is personal to us and our argument filed in this cause; but we will reply to an assertion on page 8, fifth line from bottom of page—"Moore's certificate, like all such, declares that his purchase is subject to any right of pre-emption that may be proved afterwards." This assertion shows the bad effect of Thompson's letter. There was no proof about the words of the certificate of sale, hence it was not proper to make the statement. But we go further, and say that when the land is sold either at private or public sale by the land officers for money, there is no such clause in any certificate; but if the land is entered with warrants, then there is a clause that extends to pre-emptions then made, if filed within thirty days.

But Moore is a speculator and has no rights. Have we driven the defendant to that point? The proof shows that Mitchell and Moore entered this land, and it also shows that Mr. Bunn was a merchant in Bloomington and came down and hunted up his land, built a shanty on it, lived in it four or five days, went back to Bloomington to selling goods again, all in seven days—see record, pages 51 and 78. The proof fits the insinuation poorly. And yet the defendant's counsel continue to misconstrue our brief—see page 9. We have not contended that this land was not subject to an honest pre-emption. All we said was that it was not under the law of 1841, but we admit it to be subject to pre emption under the acts of Aug. 2, 1852, and of March 3, 1853, under which last acts the case of Clement vs. Warner, 24 How., 394, was decided. Defendant further says that there is no proof that this section 27, T. 19, R. 3 e., is one of the sections alternate to those granted to Ills. The act of Congress, of Sept. 20, 1850, donated the even sections for six miles on each side of line of railroad; this makes the odd sections alternate sections, and Smallwood says, page 62 of record, 26 of copy, in answer to question 3. How far is this land from the Illinois Central Railroad? I think it is four and a half miles. The defendant has copied largely from the decision of the state court in this case, in regard to Bunn's right to convey his land before his patent is issued. We are not convinced by the argument of our own court in that respect. The prohibition contained in sect. 12, of the act of Sept. 4, 1841, last clause, is in these words: "and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null, and void." These are not ambiguous or obscure words. What was the right hereby secured? The right to pre-empt a tract of land, live on it and not transfer it until the patent is issued. The law and the decisions of the Department are with us in this respect—Lester's Land Laws, page 384, No. 424; page 484, No. 526. No decision can be found changing this.

The penalty in section 13 is very different. That is a punishment for perjury in swearing to a state of facts that will get him the patent, and when the Government finds that he swore falsely he is subject to all the pains and penalties of perjury, loses both his land and money if he owns the land, but if he has sold the land to an innocent purchas-

er for a valuable consideration, then the land does not revert. It is, and always has been, an object of the Government to make pre-emptors reside on and cultivate their land for twelve months and until they get their patent. It is not a hard condition, and it is a plain statement of the law and was intended to apply to all pre-emptions before the patent issued. Bunn and Robbins both knew of this provision of the law when the mortgage was made. Bunn's patent was not issued, in fact his mortgage was made two days after he entered the land, and is some proof that he is guilty under section 13. But under that section, the land in Robbins' hands, with this evidence, could not be reached. The distinction between the operation of the two sections seems to us to be too plain for argument; and yet we failed, signally failed, to make our Supreme Court see that distinction, and we will not follow the example of defendant in error in printing our old argument in this cause. If Bunn was an honest pre-emptor, struggling for a home, there would be some sense in the appeals of the defendant; but he never did, or intended to, make this land his home to cultivate it. It was a merchant from an adjoining county trying to get a tract of land without competition at the public sales, and so that he could keep his money for twelve months longer. Equity will not raise a trust in fraud of law. Legett vs. Dubois, 5 Paige, ch Rep. 114; Brown vs. Welch, 18 Ill., 346; Story's Equity, vol. 1, sec. 1503, *a* 1503; Lee vs Summers, 2 Oregon, 260; Quinn vs. Kenyon, 38 Cal., 499.

We think the equity of this case is with the title of Mitchell and Moore; that Bunn's pre-emption was fraudulent; that neither the land officers or Mitchell and Moore had any notice of it when the land was sold to them at public sale; and that the sale or mortgage made by Bunn before his patent was issued is null and void; and that the decision of the Supreme Court of Illinois, holding that Davis and Moore's title is subject to this mortgage, should be reversed.

C. H. MOORE,

pro se and for Davis.

United States Supreme Court,

December Term, 187 .

CLIFTON H. MOORE AND DAVID DAVIS,

—vs.—

RUFUS W. ROBBINS.

ERROR TO THE

SUPREME COURT of the STATE OF ILLINOIS.

Argument for Defendant in Error.

R. E. WILLIAMS, Counsel for Defendant in Error.

Parke & Burr, Printers, Bloomington, Ill.

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UNITED STATES
SUPREME COURT.

DECEMBER TERM, 187 .

CLIFTON H. MOORE & DAVID DAVIS,

vs.

RUFUS W. ROBBINS.

Error to the Supreme Court of the State of Illinois.

ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

This is a Writ of Error to the highest Court of the State of Illinois.

The jurisdiction of this Court is claimed on the fact that the decision of the State Court involves the construction of an act of Congress, and the action of one of the executive departments of the general government.

The facts of the case are briefly these. On the eighth day of November, 1855, one Thomas J. Bunn settled as a pre-emptor on a certain quarter section of land in the then Danville land district in the State of Illinois, and made affidavit

according to law to that effect, and afterwards entered and paid for the land under the pre-emption law, and on the 15th of November, 1855, plaintiff in error, (Moore,) purchased at a sale at the land office, forty acres of the land, and on the same day, one John P. Mitchell purchased the other one hundred and twenty acres, and plaintiff in error, (Davis,) claims the interest of Mitchell by mesne conveyances, before any patent issued to any of the land. Moore and Mitchell gave notice to the register and receiver of the land office at Springfield, (to which place the office had been removed from Danville,) that they desired and would contest the facts of Bunn's pre-emption. This action suspended the issuance of a patent to any of the parties until the contest was disposed of. The contestants were heard on full proofs made by all the parties before the register and receiver, and they decided that the pre-emption of Bunn was *bona fide*, and that a patent issue to him for all the land. From this decision Moore and Mitchell appealed to the commissioner of the general land office. The commissioner reversed the decision of the register and receiver, and thereupon issued a patent to Moore for the forty acres purchased by him, but Bunn appealed from the decision of the commissioner to the secretary of the interior, who, after full argument, reversed the decision of the commissioner, and reinstated the decision and judgment of the register and receiver, and ordered the patent to Moore, to be returned to the office for cancellation, and that a patent issue to Bunn for the whole. Moore was notified of this decision, but refused to comply. This final action of the department took place January 22, 1860. (See Record, p. 20, decision of the Secretary of the Interior.)

The matter thus stood before the department until 1868, when Moore applied to the secretary of the interior for a rehearing of the case, and on such application a rehearing was denied. (See Letter of the Secretary to the Commissioner of the General Land Office, Record, p. 29.)

It is proper to remark that the first action of the department in this contest was before Davis acquired such rights as he has.

Bunn entered and paid for his land, regularly as a pre-

emptor, and afterwards made a mortgage on it to secure a note of $1,000, which note and mortgage by regular purchase and assignment, became, and now are, the property of Robbins, defendant in error in this Court.

Robbins filed a bill in one of the Circuit Courts of the State of Illinois, to foreclose this mortgage. By the original bill, (which will be found beginning on page 5 of the Record,) Davis was not made a party. The bill, according to a statute in Illinois, waives the oath to the answer. Such an answer is not evidence). Moore answered. His answer will be found commencing on page 9 of the Record. Afterwards the bill was amended, and Davis made a party. The amendment will be found commencing on page 11 of the Record. This amendment makes Davis a party. Moore answers this not under oath, and answers as solicitor for Davis. These answers will be found beginning on page 13 of the Record.

The cause progressed to a final hearing and decree. (For Decree, see Record, p. 17.) The decree gave Moore his forty acres but decided that the mortgage was a lien on the one hundred and twenty acres claimed by Davis. From this decree both parties appealed to the Supreme Court of the State of Illinois—both parties assigned errors, and the case was reversed on the errors assigned by Robbins. Moore, in behalf of himself and Davis, applied to the Supreme Court of Illinois for a rehearing, which was granted, and on the rehearing the original decision was adhered to by the Court. (See Record, pp. 36, 37.) And this writ of error is sued out to bring this decision of the Supreme Court of Illinois before this Court for review.

The decree of the Supreme Court of Illinois is that the decree of the Court below be reversed for errors apparent in the record, and that the cause be remanded to the Court below for further proceedings. (See Record, pp. 36, 37, for this decree of the Supreme Court.)

I.

The first point we make on this record is, that this Court has no jurisdiction, as there is no final decree. This Court has no jurisdiction to review a decision of a State Court, except in a case where the judgment or decree brought before it for re-

view is final, and the matter cannot be further litigated in this State Court.

See Section 25 of the Judiciary Act of 1789, Statute at Large, I, 86.

Amendatory Act of 1867, Statutes at Large, 14, 386.

The language of both the original and amendatory acts is, "that a final judgment or decree in any suit in the highest "court [of law or equity] of a State in which a decision in the suit could be had." The only difference is, in the amendatory act the words in brackets are omitted.

It is manifest that a decision reversing a decree and remanding a cause back to the Court below for further action, is not a final decision. In fact, there is no decree at all in this case. The decree that was entered by the Inferior Court was reversed by the Supreme Court, and the cause remanded, and there is nothing but a suit pending in one of the Inferior Courts of Illinois.

What judgment or decree can this Court render? There is no decree in the case to be reversed for error, and this Court cannot render an original decree in the case. It is manifest there is nothing upon which this Court can act. The pleadings may be amended, and new evidence introduced, and the whole case opened for new litigation. This, we believe, to be the general practice, but undoubtedly such is the practice in Illinois. *Chickering* vs. *Fales*, 29 Ill., 294.

The proceedings are yet *in fieri* in the courts of Illinois. There is no final decree or judgment. The pleadings in the Inferior Court of Illinois may be amended, or new proofs may be offered under the present pleadings, and the Inferior Court might ultimately render a decree which might be affirmed by the Supreme Court on another appeal or writ of error to that Court, of which plaintiffs in error in this Court might not complain. It is a familiar principle held by all appellate courts and courts for the revision of errors, that they will not consider a decree or judgment of an inferior court, until that decree or judgment becomes final between the parties, and this Court has no jurisdiction to review a mere interlocutory decree, and this is nothing more. We do not deem it necessary to refer to au

thorities in support of so plain a proposition. We have filed in this case a motion to dismiss the writ of error sued out in this case, for want of jurisdiction in this Court, because there is no final decree sought to be reversed by this writ of error. And we submit this point with confidence that it is well taken. But as the Court may possibly differ from us in this, we will briefly argue the whole case.

We only desire to make two other points in this argument.

II.

"When the law has confided to a special tribunal the au-
"thority to hear and determine certain matters of fact arising
"in the course of its duties, the decision of that tribunal with-
"in the scope of its authority is conclusive upon all others."

Johnson vs. *Towsley*, 13 Wallace, 83.

Wilcox vs. *Jackson*, 13 Peters, 511; (13 Curtis, 269.)

And we would respectfully refer this Court to the opinion of the learned Chief Justice of Illinois, in the case in that Court, as a better argument than we can make on the point. *Robbins* vs. *Bunn*, 54 Ill., 49.

I had supposed and still suppose this to be the well-settled law of this Court, as well as all others, when called to determine on questions of fact that had been passed upon by a tribunal created for a particular purpose, where no appeal was given; or where an appeal was given, unless the mode pointed out by the statute had been followed. The learned counsel for plaintiff in error seems to think that this doctrine is shaken by the opinion of this Court in Johnson *vs.* Towsley, 13 Wallace, 80, quoted, *supra*. But we submit that the principle for which we are here contending is rather strengthened than shaken by that opinion. We have quoted from that opinion, on page 33, the language at the head of this point. The 12th section of the act of Sept. 4th, 1841, (the act under which this pre-emption right is claimed,) is as follows:

"That prior to any entries being made under and by
"virtue of the provisions of this act, proof of the settlement
"and improvement thereby required, shall be made to the satis-
"faction of the register and receiver of the land district in

"which such lands may lie, agreeably to such rules as shall be "prescribed by the Secretary of the Treasury, who shall each "be entitled to receive fifty cents from each applicant for his "services, to be rendered as aforesaid."

The 11th section provides who shall determine the right between two rival pre-emption claimants to the same tract of land, and then the 12th provides how the facts necessary to constitute a right of pre-emption are to be determined in such a case as this. Statutes at Large, V., 456.

We think the case of *Johnson* vs. *Towsley* fully sustains this view. In addition to the language from that opinion above quoted, we would call the attention of the Court further to that opinion. On page 86, occurs the following:

"It is fully conceded that when these officers decide con- "troverted questions of fact, in the absence of fraud or imposi- "tion, or mistake, their decision on those questions is final, ex- "cept as they may be reversed on appeal in that department. "But we are not prepared to concede that when in the applica- "tion of the facts as found by them, they by misconstruction of "the law, take from a party that to which he has acquired a "legal right under the sanction of these laws, the courts are "without power to give any relief."

We have no desire to controvert this doctrine. This is simply holding, as we now contend, that on questions of fact, in the absence of fraud *in these officers*, their decision is final, but not of course on questions of law. This is a principle against which no sound legal mind could for a moment object—it is merely a repetition of the same doctrine in the case of Wilcox *vs.* Jackson, 13 Peters, *supra.*

Again, on p. 87, 13 Wallace, the Court say:

"This Court has at all times been careful to guard itself "against an invasion of the functions confided by law to other "departments of the government."

The decision in the case in 13 Wallace, is merely that a construction of law by the officer of the department, does not control the courts; but on questions of fact, which the law has confided to their decision, in the absence of fraud, imposition or mistake on their part, their decision is final. This is all we

are contending for, and all the Supreme Court of Illinois decided in its opinion in this case.

It will be found on a careful examination of the answers of Moore to the original and amended bill, and of the answer of Davis to the amended bill, that there is not a single allegation of fraud, imposition or mistake in the officers of the department. All the allegations of fraud are aimed at Bunn. Nor does counsel in his argument claim that the officers of the department were guilty of fraud, accident or mistake, simply an error of judgment. The record shows a full trial on full proofs by Moore and Mitchell, and Bunn, before the register and receiver. Their decision on the simple questions of fact was, was Bunn a settler in good faith on the land before its entry by Moore and Mitchell? These are simply questions of fact, the decision of which the law confides to these officers. They were not decided *ex parte*, but on full proof. Without fraud on their part, there is no question of law involved in the decision.

Moore, eight years afterwards, and after getting all the additional evidence he could, asks the department to reopen the case, and the department again reiterates its former decision. He now comes into this Court and asks it to take jurisdiction, not of a final decree, but an opinion of the Supreme Court of Illinois, announcing the familiar doctrine of this Court, that such a decision on a simple question of fact, on a full hearing and argument, and in the absence of all fraud even intimated against the officers making it should not be disturbed. The whole argument on this branch of the case is but a reiteration of his argument on the facts made, first, to the register and receiver at Springfield, afterwards to the commissioner of the general land office, and twice before the secretary of the interior; then before the Inferior Court of Illinois, and twice before the Supreme Court of Illinois. It is now redressed, and appears in this Court in the attitude of a shabby, genteel man, well patched, darned and brushed, and we would respectfully suggest, that after having done duty so many years, and in so many different tribunals, and with such small success, it ought, in all charity, to be mustered out of service, and consigned to the limbo of forgotten eloquence.

That this Court has always taken a favorable view of both the law and the facts in the case where a pre-emptor's title was questioned by a speculator, is natural and to be expected. It is but following out the established policy adopted by the legislative department of the government, and that such has been the view of the Court, we cite Clements *vs.* Warner, 24 How., 395.

But we are not asking in this case anything but the well-established, familiar rule, that this tribunal having been appointed by law to decide a question of fact, that decision will not be reviewed by a court unless on the ground that the special tribunal acted through fraud, or mistake. No fraud is alleged, nor any mistake. The most that is alleged is an error of judgment. We submit, then, that this Court will not open this question of fact, especially where the pleadings do not set up fraud, accident, or mistake, on the part of the officers, or charge false evidence on an *ex parte* hearing; but even if it should, we presume it would come to the same conclusion to which all the other tribunals have arrived, that have passed upon the facts, that they were properly found by the register and receiver in the first instance.

But we submit, that on this question the Court will not take jurisdiction. This Court, as we understand it, cannot take jurisdiction of a decision of a State Court on a question of fact, and all that can be said of the decision of the Supreme Court of Illinois on this question, (if there be any such decision within the meaning of the Judiciary act, which we deny,) is that it found the facts wrong. This gives this Court no right to review its finding on the facts. The only effect of the opinion of the Supreme Court of Illinois, when it is carried into effect by a final decree, will be, as the Court says in Johnson *vs.* Towsley it ought to do, is to take the patent title from Moore and vest it in Bunn, who was a pre-emptor, and had the right of pre-emption before Moore's entry. Moore's certificate, like all such, declares that his purchase is subject to any right of pre-emption that may be proved up afterwards. He took his certificate of purchase subject to this condition on the face of it, and as a matter f law such pre emption was proved up in

the opinion of the officers of the government, whose duty it was to pass on the fact of such pre-emption existing. He obtained the patent in fraud of this right, and holds the legal title thus acquired in trust for Bunn, or the defendant in error in this case. And if there was a final decree in Illinois, so ordering, it would not be error, but equitable and just. Moore was notified to return his patent and withdraw his money, and Mitchell was notified to withdraw his money immediately in the first decision of the Secretary of the Interior, but declined to do so. We do not desire to add anything further on this point.

In reply to the suggestion of counsel for plaintiff in error, that the land in controversy in this case is not subject to pre-emption as being a part of one of the sections alternate to those granted to the State of Illinois, in aid of the construction of a railroad, we would say in brief,—*First*, this record discloses no such fact, and—*Second*, if it did, it has been expressly decided by this Court that such alternate sections were subject to pre-emption by settlement made at any time before the sale, in a case where this was the direct and only question before the Court. Clements *vs.* Warner, 24 How., 394.

On the point made by counsel for plaintiff in error, that the mortgage of defendant in error is void because it was made before the patent issued, we cannot make as able an argument as is made in the opinion deliverer by the Chief Justice of Illinois on the rehearing of this case in the Supreme Court of Illinois, and we take the liberty of printing that opinion as a part of our argument here. It will be found reported in Robbins *vs.* Bunn, 54 Ill., 54.

"A rehearing having been granted in this case, we have "again considered it, but see no reason to doubt the soundness "of the conclusions announced in the former opinion filed "herein. It is unnecessary to add anything to that opinion in "regard to the questions which it discusses. We will, however, "state our conclusions upon another point not pressed in the "first argument, nor considered by the Court, but upon which "stress is laid in the petition for rehearing, and in the second "argument, it is urged by counsel for appellee, that as the "mortgage was made by the pre-emptor before the patent was

"issued, it was void, and Robbins took nothing by the assign-
"ment. This position is founded on the twelfth section of the
"pre-emption law of 1841, which read as follows:

"*And be it further enacted*, That prior to any entries being
"made, under and by virtue of the provisions of this act, proof
"of the settlement and improvement thereby required, shall be
"made to the satisfaction of the register and receiver of the
"land district in which such lands may lie, agreeable to such
"rules as shall be prescribed by the Secretary of the Treasury,
"who shall each be entitled to receive fifty cents from each ap-
"plicant for their services, to be rendered as aforesaid; and all
"assignments and transfers of the right hereby secured, prior
"to the issuing of the patent, shall be null and void."

"It is insisted, that under the last clause in the foregoing
"section, the mortgage is void.

"In order to arrive at a satisfactory conclusion as to the
"meaning to be given to this section, it must be considered in
"connection with the next, or thirteenth section of the same
"act, That provides that, before any person claiming the bene-
"fit of the act, shall be allowed to enter the land occupied by
"him, he shall make an affidavit before the register and re-
"ceiver, stating certain facts, one of which is, that he has not
"made a contract with any person by which the title to be ac-
"quired by him from the government, will enure in whole or
"in part, to the benefit of any person except himself. The sec-
"tion further provides, if he swears falsely in the premises, he
"shall forfeit the money which he may have paid for the land,
"and his right and title to the land, and any grant or convey-
"ance which he may have made, except in the hands of *bona*
"*fide* purchasers, for a valuable consideration, shall be void.

"We think it evident, from these two sections considered
"together, that the government was seeking to protect itself
"against claims under settlements not made in good faith for
"the purpose of occupancy by the settler himself, but made
"with a view of securing the title of desirable lands for specu-
"lators. In order to accomplish this, the twelfth section makes
"null and void all assignments 'of the right hereby secured'
"before the patent issues. What is 'the right hereby secured'

"referred to in this phrase? It is simply the right of pre-
"emption—the right to purchase the land at the government
"price in preference to any other person, and before it is
"offered at public sale. Any transfer of that right is forbid-
"den, and any contract made before the purchase from the gov-
"ernment is completed, by which the settler should agree to
"convey his title when required, to another, would be void.
"While the twelfth section refers simply to the right of pre-
"emption existing in the settler, before the pre-emption or pur-
"chase is actually made, and applies to such right the appro-
"priate words 'transfer' and 'assignment,' the thirteenth
"section, in declaring the penalty for a false affidavit, provides
"for a forfeiture both of the money and of the title to the land,
"unless it has passed into the hands of an innocent purchaser.
"The conveyance which is pronounced void in this section in
"case of perjury, and if not made to an innocent purchaser, is
"not a transfer of the right of pre emption referred to in the
"twelfth section, but a conveyance of the title acquired by the
"purchase, and hence the use of the appropriate words 'grant'
"and 'conveyance.' Hence, too, the exception in favor of in-
"nocent purchasers. A person buying after the land has been
"entered, whether before or after the patent is issued, would
"be an innocent purchaser, if buying without knowledge that
"the affidavit was false, and hence his rights are saved. But
"there is no saving clause for innocent purchasers in the 12th
"section, because in the transfer of the mere right of pre-emp-
"tion, before the land is entered, there can be no innocent pur-
"chaser. The purchaser buying only a right of pre-emption,
"would be chargeable with knowledge that he bought in viola-
"tion of the law.

"The error in the argument of counsel for appellee, lies in
"the assumption that the right, the transfer of which is pro-
"nounced void by the twelfth section, refers not only to the
"right of pre-emption, but also to the title acquired by the ac-
"tual purchase of the land, the payment of the money there-
"for, and the receipt of a certificate of entry. The only ground
"for such a construction is the phrase 'prior to the issuing of
"the patent,' in the clause forbidding the assignment of the

"right. It is certainly an inaccuracy to speak of the right of "pre emption as existing, until the issuance of the patent, when "the right has been exercised, and the person possessing it has "made his proof, paid his money, and received a certificate of "purchase, which would entitle him, by its express terms, to a "patent, as soon as it should be presented to the commissioner "of the general land office. Evidently the phrase was care-"lessly used, and must be construed as referring, not to the "date of the actual issue of the patent, but to the time when "the right to it actually accrues; that is, the time when the "land is purchased. The words in the act are, in fact, surplus-"age, for any attempted assignment of the right of pre-emp-"tion would necessarily be prior to the issuing of the patent, "and also prior to the entry of the land.

"That we are not mistaken in our understanding of what "is meant by the right, the transfer of which is prohibited, is "shown by recurring to the previous legislation of Congress. "In the third section of the pre-emption act of 1830, we find "the following words: 'All assignments and transfers of the "'right of pre-emption given by this act prior to the issuance "'of patents, shall be null and void.' Here the right which is "not to be transferred, is expressly defined. It is the right of "pre-emption. This act, by its terms, was to remain in force "but one year, and in 1832, after the act had expired, another "act was passed, containing but one section, which merely pro-"vided that certificates of purchase, issued under the act of "1830, might be assigned, and patents be issued in the name of "the assignee. This act was, doubtless, passed to remove any "oubts which might arise under the first act, and shows clear-"ly that it was not the policy of Congress to prohibit the trans-"fer of certificates of purchase. These different acts will be "found in the appendix to the second volume of Purple's "Statutes.

"It is incomprehensible that Congress should have intend-"ed to prohibit the sale of lands by purchasers from the govern-"ment, until they had received their patents. Such a prohibi-"tion would have been not only grossly unjust, but, so far as we "can see, without object. When government, by its officers,

"was duly satisfied of the right of pre-emption, and had, in the "mode pointed out by law, made sale of a tract of land and re- "ceived the purchase money, it held the legal title only as trus- "tee, and the purchaser was entitled to it as soon as the patent "could be issued. But considerable delays would frequently "and probably generally occur in the issuing of patents, and to "prevent the owner of land, for which he had fully paid, from "selling it until the patent should be received, would be to the "last degree unreasonable. If it were conceded that the gov- "ernment could impose such a condition upon purchasers, and "that it designed to do so, it should be construed merely as a "condition of which the government alone could take advan- "tage. But we have no idea the government intended to im- "pose such a condition. As a matter of fact, certificates of "entry have always been considered assignable in this State, "and by the fourth section of the chapter of evidence, they "have been made evidence of legal title, on which recovery "could be had in ejectment, either by the person making the "entry, his heirs or assigns, unless a paramount title is shown.

"We are of opinion the mortgage in this case being made "after Bunn entered the land and received his certificate, was "not void under the act of Congress.

"We are also of opinion the defendants were not entitled "to have the taxes paid by them made a prior lien to the "mortgage.

"The other points made on the re-argument fall within the "principles announced in the former opinion. They relate to "the right of pre-emption litigated before another tribunal."

We also take the liberty of printing here our argument, (which is not lengthy,) on the rehearing, believing that it expresses our views of the case as fully as we can express them here:

"From the announcement made by the Court in granting the motion for a rehearing in this case, we will only argue the questions as to whether the mortgage which the complainant seeks to foreclose in this case is void. And whether if it is, it is only so as against the United States, and whether appellees are in a condition to take advantage of it, if it is void.

"The reasons why we did not argue this on the original hearing, are: First, that it was not suggested in the court below, and we either did not see brother Moore's argument in time to answer it, or if we did, we did not consider *this point* of sufficient importance to reply to it. The last clause of the 12th section, of the act of September 4th, 1841, is as follows: "And all assignments and transfers of the right hereby secured prior to the issuing of the patent, shall be null and void." We understand our brother Moore contends under this, that the mortgage we are seeking to foreclose is void, because it was made before a patent to the land issued, and being void, he can attack it.

"To which we reply: The title of a pre-emptor to the land, after proof of settlement and entry, and a payment of the money, is a perfect title in every respect, except in the action of ejectment it cannot prevail over a patent that may be issued to another, but in equity it is perfect for all purposes, and even before entry and purchase it is held in this State by this Court, by repeated decisions, that it is subject to sale, and can be disposed of; especially is this so unless the sale is expressly prohibited by law.

"May *vs.* Sims, 20th Ills., 95. Delanney *vs.* Burnett, 4th Gill, 454. Phelps *vs.* Smith, 15th Ills., 572. Morehouse *vs.* Phelps, 18th Ills., 472.

"It has passed from the control of the government; they have nothing to do but to issue the patent, as complete evidence of the right. The patent does not give any title to the land; it is only evidence of the right. "No reservation or appropriation of a tract of land can be made after a citizen has acquired a right to it under a pre emption law." United States *vs.* Fitzgerald, 15th Peters, 401.

"The claim of a pre emptor is not that shadowy right, which by some it is considered to be, but when covered by the law is a legal right." And this language is used in a case where the entry was not consummated. Lytle *vs.* State of Arkansas, 9 Howard, 314. In this State the certificate of entry is a title

upon which ejectment may be sustained; this is too familiar to the Court to need or warrant the citation of authority.

"Bunn then, after his entry and payment of the money, had a title good for all purposes, unless he is restrained by positive law from selling until after the issuance of the patent. The policy of the law in this country is not to restrain the alienation of real estate. And this Court will not presume that Congress would contravence this well-settled policy, in the absence of express law, that cannot be construed otherwise.

"We come now to consider the act of 1841. The whole act is to be taken together, to get the meaning of the legislative body. The next section after the one quoted by brother Moore, the 13th, provides, that before a party shall be permitted to enter the land, he shall make a written affidavit, and among other things, "That he or she, has not directly or indirectly made an agreement or contract, in any way or manner, with any person or persons whatever, by which the title that he or she might acquire from the Government of the United States should inure in whole or in part, to any person except himself or herself. And if any person taking such oath shall swear falsely in the premises, he or she shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he or she shall have paid on said land, and all right and title to the same. And any grant or conveyance which he or she may have made, except in the hands of *bona fide* purchasers, for a valuable consideration, will be null and void." It is evident from this that a conveyance in the hands of a *bona fide purchaser* for a valuable consideration is not null and void. And this Court in May *vs.* Sims, 20th Ills., on page 100, in construing this, well put the question, "and if he was such a purchaser, did not the act of 1841 protect his rights?"

"There is no pretence in this case that Lewis Bunn, the original mortgagee from Thomas J. Bunn, the pre-emptor, is not a *bona fide* purchaser, and especially is there no pretence that Robbins, the complainant in this case, is not a *bona fide* purchaser of the mortgage, and this is the end of the objection that this mortgage is void, and we might here safely leave the

argument. But we will briefly inquire what is the meaning of the latter clause of the 12th section of the act of 1841? "All assignments and transfers of the right hereby secured, prior to to the issuing of the patent, shall be *null and void*." The meaning of this is evident, that before the proof is made required by the statute of the settlement, &c., before the party has acquired any estate in the land, but while he has his inchoate right secured by the statute to make this proof, and enter and pay for such land, this right is not to be assigned or transferred. Does it mean after he has perfected this right by making his proof, and entering and paying for the land, and thus acquired the full ownership of it, that he cannot *sell* or *convey* the land itself. If the intention of Congress was to prevent the alienation of the land at any time before the issuance of the patent, they have chosen very inapt and untechnical words to convey such intent. Assignment and transfer of a right is not the language that would be used if the intent had been to prevent a sale or conveyance of the land.

"The meaning is evident, that while the right existed in the inchoate form, it should not be assigned or transferred to another. And the reason of this is plain: that by permitting such transfers it would complicate the taking of proofs, and would hold out inducements to perjury, and it was to prevent this, that this clause was put into this statute. But what interest the government should have in the fact, whether the land should be sold after it was entered and payed for, before the issuance of the patent, we cannot perceive. But as purchasers for a valuable consideration in good faith, are such favorites of the law, Congress especially provided in the next section, that they should be protected even if the right was assigned or transferred before the entry. We do not suppose it will be argued, that we are not purchasers in good faith for a valuable consideration. We show the note and mortgage with the assignment to the complainant, and there is no pretence in the record anywhere that he did not purchase and pay for the same in good faith, and that being the case, the Court is bound to protect him no matter what construction may be given to the 12th section.

"But, under a fair construction of the entire act, could any one but the government take advantage of a violation of the law? There is nothing in the whole act that contemplates that any one except the government can take advantage of it. And as it is (at least under the construction claimed by our brother Moore) a highly penal statute, we invoke the familiar principle that the *law* abhors a forfeiture and will never enfore it, except in a very clear case, and that a court of equity never will.

"We would suggest that it comes with bad grace from our brother Moore, to say this mortgage is void because we have no patent, when but for him we would have one. The only reason we do not have a patent for the whole land is, because by his own wrong he has got a patent for part of it, and refuses to surrender it on the request of the department, in order that a patent might issue to us. We conclude then that the act of 1841 did not intend to prevent the alienation of the land after it is entered and paid for; that this being against the policy of our system of government is not to be presumed, and must plainly appear; that the language used in the 12th section is not apt language to express such an intent, but is apt language to forbid the assignment or transfer of the right to make proof and payment before it is done. But in any and all events, innocent purchasers for value must be protected and the title held by them is good. We are such an innocent purchaser for value, and the Court will protect us. May *vs.* Sims, 20th Ills., 100, *supra.*

"We submit, then, with entire confidence, if the point made on the rehearing had been made on the original hearing, that your Honors would have arrived at the same conclusion that you did, and that the opinion delivered is sound law, and should stand as the opinion of the Court."

On this opinion and argument we submit the case.

The acts referred to in the opinion of Chief Justice Lawrence, will be found as follows:

The act of 1830, U. S. Statutes at Large, IV., 421.
The act of 1832, Id. IV., 496.

To sum up briefly: We say first, this Court has no jurisdiction, because there is no decree below, final or otherwise, consequently this Court will dismiss the case for want of jurisdiction.

Second, Should the Court take jurisdiction, it will not review the decision of the officers of the land office on a question of fact, heard on full evidence, where there is no allegation or pretence in the pleadings that there was any fraud in the officers making the decision, nor any accident nor mistake nor any false evidence before them. But all that is or can be alleged against the decision is, that it is an erroneous decision or error of honest judgment on the facts, and this we deny, as we say the Court on an examination of the facts will arrive at the same conclusion on these facts, that the register and receiver, and two different secretaries of the interior have arrived at. And we invoke the general policy of liberal interpretation of the laws, in favor of this class of claimants of the public domain as instanced in Clements *vs.* Warner, 24 How., *supra*.

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